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November 4th, 1867.

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AND

Claims of Peerage

BEFORE

THE HOUSE OF LORDS.

REPORTED BY CHARLES CLARK, BARRISTER-AT-LAW,
BY APPOINTMENT OF THE HOUSE OF LORDS.

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In the head note, p. 150, line 8, *delete* the words after "general law," and *insert* these words: "In the sense of *private right* the maxim has no application to it."

To the Counsel for the Respondents, p. 156, *add* "Mr. *Robert Griffin* (of the Irish Bar)."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

CATHERINE PARKINSON . . . . APPELLANT;

AND

ROBERT HANBURY AND OTHERS. . . . . RESPONDENTS.

1867
Feb. 12, 14.

Mortgagee—Accounts—Purchaser—Pleading—Practice.

LR 2 HL 639
4 HL 546
6 App Ca
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A mortgagee who takes possession of the mortgaged estate is, on a bill for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default; but where persons, who though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established.

Where a Plaintiff seeks to open a settled account, there must be in the bill a distinct statement of specific errors in the account.

A person who, under a mortgagee, becomes possessed of a property, supposing himself to be its purchaser, if it afterwards appears that he is not validly clothed with that character, but only holds a lien on the property in virtue of the money advanced by him on the supposed purchase, cannot, therefore, be so treated as to make him liable to render accounts as an ordinary mortgagee in possession. It is essential to the creation of such a liability that he should have known he was in possession as mortgagee.

Neesom v. *Clarkson* (1) observed upon.

THIS was an appeal against a decree of the Court of Chancery, originally pronounced by Vice-Chancellor *Kindersley* (2), and then affirmed by the Lords Justices (3).

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(1) 2 Hare, 163. (2) 1 Drew. & Sm. 143. (3) 2 De G. J. & Sm. 450.

The Appellant was the daughter and administratrix of *John Farrell Parkinson,* deceased. The Respondents constituted the firm of *Hanbury, Buxton, & Co.* *Parkinson* was possessed, under leases for various terms, of a public house called the *Royal Oak,* situate at the corner of *Galway* and *Waterloo* streets, in the parish of *St. Luke* (where he then carried on the business of a publican), of eight houses in *Radnor Street* and *Waterloo Street,* of three houses in *Galway Street,* and of a timber yard and small tenement at the corner of *Bowling Green Lane,* and a piece of land in the latter place, in the parish of *Clerkenwell.*

On the 26th of May, 1823, *Parkinson* mortgaged to *Thomas Chambers,* to secure repayment of a sum of £2000, the term, wanting seven days, of his interest in the *Royal Oak* and the eight houses in *Galway* and *Waterloo* streets. The mortgage contained a power of sale upon three months' notice given to *Parkinson,* or his representatives.

Hanbury & Co. had at various times lent money to *Parkinson,* who was in that way indebted to them in a sum of £735. This debt was secured to them by two promissory notes. On the 10th of January, 1828, *Parkinson* assigned to *Thomas Butts Aveling* (who represented *Hanbury & Co.*) the remainder of the term of his lease of the *Royal Oak,* upon trust, that in case default should be made in the payment of the sum of £735, *Aveling* should have the absolute power to sell the premises by public auction, or private contract, or otherwise, and to pay the £735 and interest, and the money due on the mortgage of 1823, and in case of there being a surplus, to pay the same to *Parkinson,* his heirs, executors, &c.

In May, 1828, by an arrangement between *Thomas Chambers* and *Hanbury & Co.*, the latter, as *Chambers'* receivers, entered into the receipts of the rents and profits of the property mortgaged to *Chambers,* who gave to the tenants of the houses an authority to pay the rents to them. This arrangement was consented to by *Parkinson,* whose circumstances were at that time very embarrassed. He signed a memorandum to *Hanbury & Co.* in these terms: "I authorize you, or your agents, to collect the rents of the five houses in *Radnor Street* and the three houses in *Waterloo Street,* and also the rent of the timber yard situate in *Bowling Green Lane,* and to pay thereout (as far as the same may extend) the several ground

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rents for the said premises, and the public house called the *Royal Oak*, and also in discharge of the principal and interest that may become due on the mortgage existing on the said property, and keeping the said premises in necessary repair, and in other outgoings, I having this day quitted possession of the same to you, and generally to act in the management of the estate as to you shall be deemed expedient, and for so doing this shall be your sufficient authority." *Parkinson* died intestate in October, 1831. On the 7th of June, 1834, *Hanbury & Co.* delivered up the possession of the premises, which up to that time they had held under these documents, and rendered accounts of the income and outgoings. The Appellant made some objections to some of these accounts; answers were sent to her objections, and she made no observation in reply. What occurred between the date of June, 1834, and the 9th of October following, did not clearly appear in evidence. On the 9th of October, 1834, the executors of *Chambers*, under the power of sale contained in the mortgage to him, sold the property to *Hanbury & Co.* for the sum of £1300, a sale which was afterwards declared to be invalid, because it was effected without the three months' notice required by the power of sale contained in the mortgage.

After the execution of the deed of sale, *Hanbury & Co.* received, on the 29th of November, 1834, the half-year's rent due at Midsummer, and on the 10th of February, 1835, the rent due at Michaelmas, 1834, but in what character did not distinctly appear. At this period, and for some time afterwards, there was no legal personal representative of *Parkinson*. In February, 1845, the Appellant took out letters of administration to her father, and in 1848 she filed her bill, alleging (but without specifying items) that the accounts rendered were erroneous, that the Respondents had not rendered accounts of the goodwill and profits of the business of the *Royal Oak*, and praying that the Respondents (whom she treated as mortgagees in possession) should render in that character accounts of what they had received, or what, but for their wilful default, they might have received. In 1852, she filed a similar bill, and in 1854, on her own application, the bill of 1848, which the Respondents had duly answered, was dismissed. The bill filed in 1852 (amended in August, 1858 and re-amended in December, 1858) prayed for an account of what was due to the Respondents on their security of January, 1828, or otherwise charged upon the mortgaged premises in the bill mentioned, that they might be decreed to account for the profits of the *Royal Oak*, and of the goodwill of the business thereof, received by them, or their agents, or which, without their wilful neglect or default, might have been received by them, from June, 1828, up to the filing of the bill: and that they might account for the rents and profits of the houses in *Radnor Street* and *Waterloo Street* up to the time when the same were taken possession of by *Chambers*, or to such farther time as the Court might deem fit; also of the timber yard and tenements adjoining, and of the houses in *Galway Street* and the ground in *Coppice Row*. And that it might be declared that, notwithstanding the conveyance and assignment of the *Royal Oak* by *Chambers* to the Respondents, they were trustees or mortgagees thereof—and that the Appellant was entitled to redeem the same, and all the other premises then in the possession of the Respondents—and for the usual orders thereon, and for farther relief.

The Respondents put in their answers, affirming the correctness of the accounts delivered, alleging that they had collected the rents in the character of agents, and denying that they ever had received, or been entitled to receive, anything for the goodwill and profits of the business. The cause came to issue, evidence was taken, and it was heard before Vice-Chancellor *Kindersley*, who, on the 7th of June, 1860, made his decree, by which the bill was ordered to be dismissed with costs, as to the relief sought to be obtained thereby in respect of all property in the pleadings mentioned, except the *Royal Oak*, as to which it was ordered that an account should be taken of what was due in respect of the security of January, 1828, or otherwise charged upon the mortgaged premises, and for the costs of the suit; and that an account be taken of rents and profits received by the Respondents from the 1st of June, 1828, to the present time; and that, upon the Appellant paying to the Respondents the principal, interest, and costs, after such deductions, and giving credit to them for £1300 and interest from the 9th of October, 1834, they should re-convey, &c. But in default of her making such payment the bill was to be dismissed with costs.

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On appeal to the Lords Justices, they, on the 15th of January, 1865, affirmed this decree with costs.

This appeal was then brought.

Mr. *J. George N. Darby*, for the Appellant:—

The Respondents were mortgagees of the *Royal Oak*, under the security of January, 1828, and possession under it would impose on them the liability to account as ordinary mortgagees in possession. They could not refer their possession to the memorandum given by *Parkinson*, and treat themselves as agents only. Even if they could do so till *Parkinson's* death, they ceased after that period to hold, except in the character of mortgagees, or if, between October, 1831, and June, 1834, they acted as the agents of *Chambers*, they gave up that character in June, 1834. Since the purchase from *Chambers* (which was invalid, and gave no title as a purchase), they must be treated as having held in the character of mortgagees in possession. They were, in fact, mortgagees, and the rents which became due before the contract of purchase could only have been received by them in that character. They had no title to receive those rents in any other. If so, then the account directed should have been not merely of the rents and profits of the *Royal Oak* actually received, but also such as might have been received but for their wilful default. The case of *Chambers* v. *Goldwin* (1) is in point. In that case there was a conveyance, as if in trust, of a *West India* estate, which, like the assignment of the reversion here, was, in fact, a mortgage, and was so treated by the Court. The assignee, therefore, was held liable to account as a mortgagee in possession, and, though he had settled accounts with the executors of the mortgagor in the character of trustee or agent, the Court treated those accounts as not finally settled, and, on a bill filed by the daughter of the mortgagor, she was held entitled to require accounts as between mortgagor and mortgagee, and to surcharge and falsify the accounts already settled with the executors.

The Appellant has sufficiently alleged errors in these accounts. She has claimed to have accounts of the money obtained for the goodwill of the *Royal Oak*, and from the profits of the business,

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(1) 5 Ves. 834.

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which she alleges to have been under the control of the Respondents. She is, therefore, entitled to have the accounts opened.

[At the close of the first day's hearing the Appellant claimed to address the House, but was informed that that was not to be permitted, as she had already been heard by her learned counsel, who had very ably conducted her case. On the following morning]

Mr. *Glasse*, Q.C., and Mr. *E. K. Kay*, Q.C., addressed the House for the Respondents. They contended that the Respondents had never held the character of mortgagees in possession, but had either acted as agents for *Chambers*, with the assent of *Parkinson* himself, or had borne the character of purchasers for value. They referred to *Lord Trimleston* v. *Hamill* (1), where Lord Chancellor *Manners* distinguished between a mortgagee in possession and a mere trustee or agent, on the ground that the former never, and the latter always, rendered annual accounts, and held that the accepting of such annual accounts fixed the party accepting them as having treated the party rendering them as trustee or agent, and not as mortgagee. There the case of *Chambers* v. *Goldwin* was referred to, and held to be inapplicable, because there (as here) the facts shewed that the possession was that of a trustee or agent, and not of a mortgagee.

The Appellant in person again attempted to address the House, but was not permitted to do so. She was, however, permitted to mention the case of *Neesom* v. *Clarkson* (2), where the purchaser of an estate was held to have had the means of being cognisant of the real title to the estate, and, that title being defective, he was treated as having acted with notice, and the Court would not make presumptions in his favour merely because he was a purchaser.

THE LORD CHANCELLOR (Lord *Chelmsford*) :—

My Lords, although at the close of the case on the part of the

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(1) 1 Ball & B. 383.

(2) 2 Hare, 163. See, upon constructive notice, the subsequent case of *Hewitt* v. *Loosemore*, 9 Hare, 449.

Appellant I entertained a very strong opinion that she had wholly failed in laying any foundation for her appeal, yet I do not regret that, under the peculiar circumstances of the case, your Lordships thought proper to hear the counsel for the Respondents, in order that the case might be thoroughly investigated before your Lordships came to a final decision. I feel bound to repeat what I said in the course of the discussion, that the Appellant's case was most clearly and ably conducted by Mr. *Darby*, who brought forward every point that could possibly be urged in support of the appeal.

[His Lordship stated the nature of the suit, and the prayer of the bill.]

The Appellant is the administratrix of her father, *John Farrell Parkinson*, who died on the 6th of October, 1831. He was the lessee of the *Royal Oak* public house, under a lease for a term of fifty-three years, from the 29th of September, 1819. On the 26th of May, 1823, he mortgaged the *Royal Oak* and the eight houses in *Radnor Street* to a person of the name of *Thomas Chambers*, for a sum of £2000, and that mortgage deed contained a power of sale, which was to be exercised by *Chambers* on giving three months' notice to the mortgagor, his executors, or administrators. On the 10th of January, 1828, the *Royal Oak* was assigned by *Parkinson* to *Thomas Butts Aveling* for the Defendants, *Truman, Hanbury, & Co.* as the security for a sum of £735, and interest, due to them. That deed contained a proviso for redemption, and was clearly a second mortgage of this property. There was a trust conferred upon *Aveling* to sell or to let the premises, and out of the proceeds of the sale to pay the mortgage to *Chambers* of £2000, to pay a sum of £735 and interest to the Defendants, and to pay the surplus, if any, to the estate of *Parkinson*.

In the month of May, 1828, *Parkinson* was embarrassed, and in difficulties, and unable to carry on the *Royal Oak* public house; and he agreed, on receiving a sum of £50, to give possession of the house and other properties which he possessed to the Defendants, *who were to act as his agents*, to collect the rents, and to let the properties, and he signed a memorandum, which is in these terms (1).

At the same time, the receiver of *Chambers*, the mortgagee, also

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(1) See *ante*, p. 2.

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signed an authority to *Aveling* for the Defendants, to act as his receivers, in these terms: "Messrs. *Hanbury & Co.* having been authorized by Mr. *Parkinson*, as well as by myself, as the receiver, to enter upon Mr. *Parkinson's* houses, receive the rents, and manage, paying the rents, and keeping down the incumbrances, &c., you are required to pay your future rents (until a countermand of this notice) to Messrs. *Hanbury & Co.*, instead of me, or any person claiming on behalf of *Thomas Chambers*, Esq.—Dated this 6th of June, 1828."

Hanbury & Co. continued to act under this memorandum until the 7th of June, 1834, when they delivered up possession.

[His Lordship here stated the circumstances of the sale by *Chambers* to the Respondents, and the declaration of its invalidity for the want of notice to any representative of *Parkinson*, the fact that accounts had from time to time been delivered by the Respondents, and the institution of the suit of 1848, and its dismissal; the institution of this suit, and the decree therein. He then proceeded thus:—]

It is against this decree that the present appeal has been brought, and the reasons given for the appeal are: First. "Because by the amended bill of complaint the Appellant set out specific charges as being erroneous, and is, therefore, entitled to open such account, even if it was ever closed or settled, and thus obtain an account of the rents received for and in respect of the premises in the first portion of the decree mentioned;" and, Second. "Because the Respondents are mortgagees in possession of the said *Royal Oak* public house, and liable to account as such, and not, as in the decree mentioned, to the Appellant as administratrix of the said *John Farrell Parkinson*, deceased, for the rents and profits of the same, and are, whether in possession as mortgagees, trustees, or agents, liable to account for the profits and proceeds of the business of the said public house."

I will take the second reason of the appeal first. It is very clear that in the peculiar case of a mortgagee who chooses to assert his rights by taking possession of the mortgaged estate, and who is not bound to render any account to the mortgagor, if the mortgagor sues for a redemption of the property, the mortgagee who has so taken possession is bound to account, not only for the rents and profits which he has received, but also for everything which he might have received but for his own wilful default. That, I believe, is the only instance in which a person in possession of an estate, who is called upon to account, is made answerable for that which he might have received but for his wilful default. Therefore it was necessary, in order to lay the foundation for this appeal, to shew that the Defendants were actually in possession, and in receipt of the rents and profits as mortgagees. Now it appears to me that the Appellant has entirely failed in establishing this case.

Under the memorandum of the 10th of May, 1828, the Defendants were in receipt of the rents and profits, as the agents of *Parkinson*, and they continued in possession in that character down to the 7th of June, 1834. On the 9th of October, 1834, they came into possession under a different character, as vendees, upon the sale by the executors of *Chambers*. They received the rents down to the 7th of June, 1834; but, in addition to this, it appears by the accounts that they received the Midsummer rent for 1834, and the Michaelmas rent for 1834, being the rents for a period between their delivering up possession, which they held as the agents of *Parkinson*, and the time of their becoming vendees under the purchase from *Chambers'* executors, on the 9th of October, 1834. Now, that sale having been held to be invalid, it is contended on the part of the Appellant that these rents, having been received without any right under the memorandum of agency, or any right under the purchase from *Chambers*, that therefore the only title which the Defendants can pretend to for the receipt of these rents must be in their character of mortgagees. But, in the first place, these rents were received, not during the interval between June, 1834, and October, 1834, but the Midsummer rent was received on the 29th of November, 1834; that is, after the purchase from *Chambers'* executors, and the Michaelmas rent was received on the 10th of February, 1835. How is it possible to say that, under these circumstances, the Defendants ought to be charged in respect of the receipt of these rents as mortgagees, and that, in that character, the Appellant is entitled to have a decree against them for an account?

It may be, my Lords, that they were not entitled to receive

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those rents at all, that is putting it in the most unfavourable way for the Defendants. It may be that they were entitled, under the contract of sale with *Chambers*' executors, to those rents, although the purchase deed was not executed until after those rents became due. It may be that they considered that they were entitled to those rents under the purchase deed as back rents. But it is perfectly clear that they never assumed to receive those rents as mortgagees, and, therefore, if it is only where a mortgagee asserts his strong right by entering into possession and receiving the rents and profits, that, when he is called on to account, he has to account not only for what he has received, but also for that which he might have received but for his own wilful default; that principle cannot certainly apply to this case.

My Lords, it appears to me to be impossible to put the case in the way in which it was ingeniously put by Mr. *Darby*, that the sale by *Chambers*' executors having been decreed to be invalid, there was no other title on which the Defendants could possibly be in possession except that of being mortgagees, and that, therefore, retrospectively, it must be considered that their possession must be applied to that title as mortgagees, and to no other. I apprehend that it is perfectly clear that that cannot be maintained.

And, my Lords, just consider for one moment the situation of this case with regard to the proceedings which have been stated to us. In the proceedings on the bill of 1848 precisely the same accounts as those which are now in question were produced to the Court and were examined; and in those accounts, of course, there were those two items in respect of the Midsummer and the Michaelmas rents of 1834. The Appellant had an opportunity at that time of questioning the title or the right under which the Defendants received those rents; and these accounts were at that time considered to be perfectly satisfactory, and, upon her own application afterwards, her bill was dismissed. My Lords, I think it is impossible, under these circumstances, it being necessary for the Appellant to satisfy your Lordships that the Defendants were in possession and in receipt of these rents as mortgagees, that your Lordships can come to the conclusion that she has established any case to that extent. And, therefore, my Lords, as far as that question goes, I apprehend that the decree of the Vice-Chancellor is perfectly correct.

My Lords, I have very few words indeed to say to your Lordships as to the other ground of the appeal, which is, that by her bill of complaint the Appellant sets out specific charges as being erroneous, and is, therefore, entitled to open the account. That is an allegation which is not supported by the bill itself, because when your Lordships turn to the bill you find that all that she alleges is, that she "charges that in the accounts so rendered as aforesaid no credit is given to the estate of the said *John Farrell Parkinson* for any rent received in respect of the said timber-yard subsequently to the 1st day of March, 1832, nor in respect of the said small tenement subsequently to the 5th day of September, 1833, nor for any rent whatever in respect of the said three houses in *Galway Street* aforesaid, or of the said piece of ground and premises in *Coppice Row*." And then she "charges that the said Defendants ought to set forth whether they, or the said firm, have received any and what moneys by way of rent for the said timber-yard subsequently to the 1st day of March, 1832, and for the said small tenement subsequently to the 5th day of September, 1833, and whether they, or the said firm, have received any and what moneys in respect of the three houses in *Galway Street*, and the piece of ground and premises in *Coppice Row*."

I apprehend that where a party seeks to open a settled account, there must be a distinct statement in the bill of some errors in the account—there must be some direct, distinct, and specific averment of errors to entitle the party to open the account. There is nothing of that kind here. The Defendants are merely called on to explain whether they have or have not omitted from the account certain items which the Appellant says they may have received but have not set forth. Therefore, on that ground alone, I should be disposed to say that this reason for the appeal entirely fails. With regard to the evidence upon the subject, there is a little mystery, which can hardly be explained, as to how some receipts, signed by one *Labram*, and produced on the part of the Appellant, came to be given; but I think the evidence is pretty clear that *Labram* was not a receiver for the Defendants, because it appears by the accounts, that a person of the name of *Powell* was the receiver of the rents, and there are the accounts with his receipts down to the 7th of June, 1834, the day when the Defendants gave up possession.

Under these circumstances, I apprehend that your Lordships cannot hesitate to come to the conclusion that the decree of the Vice-Chancellor is perfectly correct, and that this appeal ought to be dismissed with costs.

LORD CRANWORTH:—

My Lords, I think, with my noble and learned friend, that the Appellant has completely failed in establishing either of the propositions for which she contends. She says that the Vice-Chancellor first of all, and subsequently, the Lords Justices, were wrong in dismissing the bill, so far as it generally sought a decree to account against the Respondents as persons who have received money as agents for her, or for her late father, whom she represents; and, secondly, upon the ground that they ought to have been charged as mortgagees for wilful default, whereas they were not so charged.

With regard to the first point, it seems to me to be so abundantly clear that, I was going to say, I wonder that the Appellant should have been advised to bring the matter into Court, but probably she was not so advised; but she chose to act upon her own view of the case. The accounts must be treated as settled accounts; the first having been delivered in 1836, but that was thrown overboard afterwards, and other accounts were delivered in 1838. Then, ten years having been allowed for looking into those accounts, a bill having been filed to investigate them; all the accounts of the firm were open to the inspection of the Appellant, or her agents, and no objections were taken to them. The bill was finally dismissed pending the present bill, which was filed, irregularly it would seem, while the former bill was still pending. Under these circumstances it is obvious that these must be treated as settled accounts, and it is incumbent, therefore, upon the Appellant to point out in her pleadings some distinct error, and establish that error by proof.

I think, without wishing to hold parties strictly or technically to the rule, the substance of it ought always regularly and rigidly to be insisted upon, that there should be something distinctly alleged by the party who is attacking accounts already treated as settled, to the effect that, although the accounts are so settled and have been so acquiesced in, there are certain errors which escaped his notice, and which must therefore be rectified. Now here the allegation is of the most vague kind possible. It is only an allegation that in respect of some small rents there has been no account rendered of the receipts after a particular date, and that the Defendants ought to set forth what receipts there were after that date. The answer the Respondents make is this: We had no receipts after that date, and there is no charge in the bill that there ever was a receipt after that date. It is said that the Defendants ought to set forth what receipts there were; but they cannot do that if there were none. My Lords, the evidence satisfies me that these Respondents are not aware of ever having received such moneys; they were said to be very small sums, but on investigation of the books, no such sums appear. Therefore, I think there is a total failure of any allegation, or even, if the allegation was dispensed with, of any proof, that any money was received subsequently to that time. I think, therefore, that the Vice-Chancellor first, and the Lords Justices afterwards, were perfectly right in dismissing the bill, as far as it rested on those receipts, in the way in which it was dismissed.

Then comes the other point, whether or not the accounts which were directed in respect of the occupation of the *Royal Oak* public house ought to have been directed charging the Defendants both with the receipts and with that which, without wilful default, they might have received. It is meant to charge the Respondents with being in receipt as mortgagees upon two grounds. That which was insisted upon mainly, was this: that their title, which they acquired under *Chambers*, on the 9th of October 1834, although supposed by them to give them a title as purchasers, really was a title which only put them in the place of *Chambers*, and *Chambers* was merely a mortgagee.

I think that it is perfectly clear law, that when a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien

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upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default. What was the origin of that rule I do not know, and it is not very clear, or very distinctly laid down in the cases; but it seems to me to depend upon this, that the party taking possession must have known that he was in possession as mortgagee. That seems to me to be essential to the rule. Whether it would be correct to say that, under those circumstances, a person who entered into possession not as mortgagee, may not afterwards become mortgagee in possession with all the liabilities of a mortgagee in possession, is a proposition which need not be laid down now. It is possible that, by distinct circumstances, it may be shewn that there was an intention to alter the character from the one to the other. But nothing of the sort appears here, and it is perfectly clear that although these Respondents were properly treated as parties who had not a valid title as purchasers, because there was nobody who could give a consent to the sale on behalf of the representatives of *Parkinson*, yet they treated themselves as purchasers having a valid title, and supposed that they were in possession as purchasers, and were therefore liable to account only in the ordinary way for the rents.

Then a point was raised to shew that they were mortgagees upon this ground:—It seems that they gave up possession as agents on the 7th of June, 1834, and they did not acquire their title as purchasers till the 9th of October, 1834. After they had acquired their possession as purchasers, or supposed purchasers, on the 9th of October, 1834, they received two portions of rent, namely, that which accrued at Midsummer, 1834, and that which accrued at Michaelmas, 1834. Now, it is said that, as purchasers in October, 1834, they could not have been entitled to those rents, because they would only have been entitled to the rent which accrued after they became purchasers. How came they to receive those rents? It is said that, because they were mortgagees under the mortgage of January, 1828, it must be presumed that they received those rents under their title of mortgagees, and not under the purchase from the executors of *Chambers*.

It appears to me that that would be pushing the doctrine to a most extravagant length. Mortgagees in actual possession they certainly were not, for they only received rents (which is the same thing, however, in point of law) but they did not receive them during the time they were agents, or during the interval between their ceasing to be agents and becoming purchasers; but they received them afterwards, and I take it that they had then no right to receive them as mortgagees. It is certainly too much to force upon persons the character of mortgagees in possession, when they never were in actual possession as such, and never received any rents, except when they had by subsequent arrangement become entitled, as they believed, as purchasers, to the actual possession, or to the actual receipt of rents and profits thence accruing.

It seems to me, therefore, my Lords, that the case entirely fails. It is only very much to be deplored that this lady should have involved herself in this course of protracted and useless litigation. I agree, therefore, with my noble and learned friend, in thinking that we ought to follow the Vice-Chancellor and the Lords Justices by dismissing the appeal, with costs.

LORD WESTBURY :—

My Lords, I have felt some anxiety in this case, by reason of the form of the decree to account for the rents and profits, and certainly that is a point which deserves some attention on the part of the House. I take the law to be this. It is undoubtedly settled in the Courts of equity, that if a mortgagee, in that character, enters into receipt of the rents and profits, he will be bound to account, not only for what he has received, but for what, without wilful default, he might have received. It is difficult, perhaps, to ascertain the origin of the rule, but I take it to be this—that when a mortgagee, by virtue of his mortgage, claims to receive the rents and profits, he is regarded in a Court of equity as the bailiff of the mortgagor. Now an account against a bailiff was, both at common law and in equity, given with wilful default. That is almost the only case, save in cases of fraud, or breach of trust, where wilful default is infused into the form of the account. And if the mortgagee is regarded as in the nature of a bailiff to the mortgagor, then it would be proper to give the decree against him, as it is always done against a bailiff with wilful default.

But if that ground is referred to as the foundation of the practice, it must of necessity follow, that the party receiving receives in the character to which that relation of bailiff and principal may be properly imputed; and consequently it would follow that if the mortgagee takes in another character, more especially if he receives in a character adverse to the right of the mortgagor, then it would be impossible to ascribe to him, by any inference of law, the conclusion that he intended to take possession, or to receive the rents, as the bailiff of the mortgagor, or that that relation could properly be imputed to him.

Supposing that to be the origin of the rule, it will, therefore, not be applicable to any case where the conclusion of the Defendant being in receipt of rent as mortgagee, is a conclusion consequential only on your having reduced and set aside some other pretended or alleged title, in respect or by virtue of which he had actually received the rents and profits.

The case here is clearly this:—The present Respondents claimed the *Royal Oak*, not in the character of mortgagees, but in the character of purchasers of the property from *Thomas Chambers*, by virtue of his power of sale. In that capacity they entered and enjoyed, and you have to remove that title by decree before you can fasten on them any thing like that state of circumstances which would bring them within the character of mortgagees in possession.

But then it was said, on the part of the Appellant, with much ingenuity, that it appeared that they had actually received some rent which accrued due at a time anterior to the date of the contract of purchase, and that it was impossible to ascribe that receipt to any other title than a title which they had as second mortgagees. But I do not think that that is a just, or, by any means, a necessary consequence. The fact appears to be, that anterior to the contract of purchase they had been in the receipt of the rents of the *Royal Oak*, by virtue of an authority which they received from *Chambers*. *Chambers*, in fact, had claimed to receive the rents and to have the benefit of the property; and he had exercised that by means of an authority given to the Respondents. Supposing that that authority had terminated in the month of June, 1834, anterior to the date of the purchase deed, yet it by no means follows that *Chambers* had then given up his right or claim to the receipt of the rents. It is impossible therefore to ascribe, with any accuracy in point of fact, the receipt of the two sums which actually came into the hands of the Respondents, in the months of November, 1834, and January, 1835, both of them after the date of the purchase deed, to the title which they might have asserted as second mortgagees, supposing *Chambers* had abandoned the receipt.

I collect, therefore, from the facts, that the inference rather would be, that these two sums of money, if they were not received by the Respondents by virtue of their purchase contract, were received by them still on behalf of *Chambers*, and not on behalf of themselves, in the character of second mortgagees. There is no room, therefore, for the argument, ingenious as it was, and which might have had some effect, that anterior to their purchase they were *de facto* in receipt of the rents in the character of mortgagees, by virtue of their second mortgage.

Then we come to the question whether the case is affected by the decision in the case which has been very properly cited by the Appellant herself this morning, namely, *Neesom* v. *Clarkson* (1). That is a case which is very material, and which needs some explanation, in order to shew that it has not a governing effect upon the case before your Lordships. The case arose under these peculiar circumstances. A man had contracted to purchase a fee simple. He died before he had paid the money. He made his widow his universal legatee and devisee. The equitable estate, therefore, which he acquired by virtue of that contract, passed, under his will, to his widow. His widow married again; and her second husband, supposing himself to be entitled, paid the purchase-money under that contract. He then mortgaged the estate, the estate being one to which he was entitled only *jure uxoris*, save in respect of the lien he had on it by having paid the purchase-money. He mortgaged it, and then conveyed it absolutely to a purchaser, in whose purchase deed, however, there were recitals stating, clearly and distinctly, in what character the vendor, that is to say, the second husband, had acquired an interest in the estate. The widow died, and the second husband died; and on the death of the widow, there being no child of her marriage with her second husband, the estate, of course, descended to her heir-at-law. The

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(1) 2 Hare, 163.

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heir-at-law filed a bill for the redemption of the property, and it was held by the Vice-Chancellor (unquestionably a strong decision) that the recitals in the purchase deed gave distinct notice to the purchaser from the second husband, that all his interest in the estate ceased upon the death of the wife, and that all that he could become entitled to was a claim in respect of the money which his vendor had paid on the original purchase. The purchaser from the second husband claimed to continue in possession. It was held that he had no title to the possession, save in respect of his lien for the purchase-money; and then, certainly by a very strong stretch of the authority of the Court, and of the principle, it was held, that as his purchase deed gave him a most distinct notice of the determination of the title of his vendor, and that he himself had no other claim than in respect of that sum of money which had been paid, his subsequent receipts must be referred to the only interest he had; and accordingly he was charged with an account directed with wilful default.

That approaches very nearly to the present case in favour of the Appellant, but certainly stops somewhat short of it, and is distinguishable from it (though, if not distinguishable, I confess I should not have been disposed to recommend your Lordships entirely to follow that authority), because in the case then before the Vice-Chancellor there was nothing to set aside; and it was held that the conveyance, upon the very face of it, was pregnant with information to the party that he had no title whatever, save in respect of his lien for the purchase-money. In the present case there was a question to be determined at the hearing. The question was this, whether the power of sale given to *Chambers,* which in its terms required notice to be given to the personal representatives of *Parkinson,* could nevertheless be operative, there being no such personal representative. It was held that it could not, and that the power did not arise, and that the conveyance therefore must be set aside. Although that was very right, yet I think it would have been very wrong if the old rule of the Court, founded on the principle of a mortgagee receiving rents, becoming in that respect the bailiff of the mortgagor, had been applied to a case where the parties clearly had taken the property, under a reasonable conclusion that the purchase deed, by virtue of which they had acquired possession, was a valid transaction, and gave them a *bonâ fide* title.

I am therefore, my Lords, of opinion in that respect with your Lordships, that the decree was rightly framed in the form in which we find it, and that the present Appellant had no title to have the account directed with wilful default.

The other point, my Lords, really is one on which, if we were to give way to the contention of the Appellant, we should weaken very much the jurisdiction of the Court. Nothing is more requisite than to abide by the old rule, clearly enunciated by Lord *Hardwicke*, and constantly followed, that if you desire to set aside, or to open, a stated and settled account, so as to have liberty to surcharge and falsify, you must, in your bill, specially charge some, at least one, definite and important error, and support that charge with evidence, confirming it as it is laid. Having regard to the manner in which evidence is taken in Courts of equity, there would be no protection to a Defendant if he had not, by proper averment in the bill, distinct notice of the allegation that he had to meet, more especially when the whole of the relief turns entirely on the power of the Plaintiff to aver, and to prove satisfactorily, some particular error in his account.

In the present case I find nothing in the bill amounting to a charge that answers at all the requisites of that rule. There is a general charge that items of receipt have been omitted in the account, and an attempt is made in the following way to verify that general charge, by putting a man of the name of *Labram* into the box, who states that, by virtue of some authority which he alleges himself to have received from a person of the name of *Whitling*, who, he says, was surveyor for the Respondents, he received sums of money in respect of the property included in the trust deed; and he also avers that he never failed to deliver the money to *Whitling*. No one of these names is mentioned in the bill, nor is there any attempt made on the part of the Plaintiff to prove that *Whitling* had any authority to give *Labram* the power to receive rents on the part of the Respondents, nor is there any attempt to prove that the money which this individual received, and, as he alleged, paid over to *Whitling*, was at all accounted for by *Whitling* to the Respondents. Now, the account

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being directed against them of moneys received by them, these circumstances by no means answer the exigency of the rule that the account shall not be opened unless some specific error be clearly alleged, and as clearly proved, by the party requiring the account to be opened.

The propriety of abiding by that rule is still farther evidenced in the present case, by the fact that under a suit commenced in the year 1848, four years before the commencement of the present suit, the present Appellant had an opportunity of investigating these accounts by a most competent practitioner employed in her behalf. She can therefore have no excuse for any want of precise allegation or averment of error in her present bill of complaint.

Decree and order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, February 14, 1867.

Appellant in Person.

Solicitors for the Respondents: *Tanqueray, Williaume, & Hanbury.*

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Feb. 19, 22.

G. O'MALLEY IRWIN . . . PLAINTIFF IN ERROR;

AND

SIR G. GREY, BART. . . . DEFENDANT IN ERROR.

Error in Fact—Jury—Practice—Time.

[illegible]
6 CP 378, 381

Error does not lie to the Exchequer Chamber on a judgment pronounced upon allegations of error in fact. But a wrong decision on an allegation of error in fact, may so appear on the record as to constitute error in law, and so may become appealable.

It is no ground of error, either in fact or in law, that all the special jurors whose names are on the panel to try the cause have not been summoned to attend. Nor is it ground of error that the jury panel was called over before ten o'clock in the morning, the hour appointed for the sitting of the Court, and that ten special jurors only having appeared, the jury was made up with two talesmen. These are irregularities for the Court to set right on motion, if any injustice has been suffered from their occurrence.

THIS was a proceeding in error upon a judgment of the Court of Exchequer Chamber, which had affirmed a previous judgment of the Court of Common Pleas. The Plaintiff in error had originally brought an action against Sir *George Grey*, who was at the time Secretary of State for the Home Department, seeking to recover damages for an alleged breach of duty by the Defendant, in neglecting to submit to Her Majesty a petition presented by the Plaintiff, pursuant to sect. 2 of the 23 & 24 Vict. c. 34, the *Petitions of Right Act*, 1860. The Defendant pleaded not guilty. The cause was tried before Lord Chief Justice *Erle*, at the *Westminster* sittings, after Michaelmas Term, 1862, when a verdict was found for the Defendant. In the following term the Plaintiff moved for a new trial, on the ground that there had been a special jury struck—that twenty-four jurors formed the panel appointed to try the cause; that only sixteen of the twenty-four had been summoned; that on the day of trial only ten out of the sixteen appeared; and that, without his consent, and, indeed, in his absence (for the matter took place before ten o'clock, the hour appointed for the sitting of the Court), two talesmen were taken to make up the requisite number, and the jury was completed in that way. The Court refused the rule. The Plaintiff then brought error in fact on the same grounds. Judgment was pronounced on the 10th of July, 1865, and the first judgment affirmed (1). This judgment was again affirmed in the Exchequer Chamber (2). The case was then brought up to this House.

The Plaintiff in error, in person, addressed the House. He contended that by the words of the statute regulating juries, 6 Geo. 4, c. 50, the jurymen whose names were on the panel of twenty-four were the jurymen who, and who alone (s. 30), unless by consent of both parties, could by law try the case. No consent of his had in this case been given to substitute others for them. The list of jurors was called over before he came into Court, and ten only appearing, two talesmen had been added. This was without his consent, and, indeed, without his knowledge. The directions of the Act had not therefore been complied with, and the proceeding was consequently illegal. That was error in law. In *Williams* v. *The Great Western Railway Company* (3), the fact that one of the jurymen was a shareholder of the company was held not to be a reason for setting aside the verdict, but that was precisely because he was one of the persons who had been struck as persons to constitute the jury, and consequently was, within the terms of sect. 30, one of the persons who alone could sit as jurymen to try the cause.

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(1) 19 C. B. (N. S.) 585; 11 Jur. N.S. 860 34 L.J. C.P. 313. (2) Law Rep. 1 C. P. 171; 12 Jur. N.S. 193.
(3) 3 H. & N. 869.

There was error in the doing of anything before the hour appointed for the sitting of the Court. That hour was ten o'clock. He came into Court more than five minutes before that time, and the jury had then been formed. Now, the time appointed must be the time observed: *Curtis* v. *March* (1). In that case a new trial was ordered, because the cause had been tried before the time appointed. In *Haldane* v. *Beauclerk* (2), a rule was obtained for a special jury, which was nominated and struck, but no jury process was issued, and the cause was tried as undefended before a common jury. The Court set aside the verdict. Unless the House overruled these cases, the judgment here given in the Court below must be reversed. *O'Connell* v. *Reg.* (3), and *Gray* v. *Reg.* (4), were also cited, to shew that objections arising upon the striking of the jury, and on challenges to the jurors, were matters of law.

The *Solicitor-General* (Sir *J. B. Karslake*), and Mr. *T. Jones*, Q.C. (Mr. *Hannen* was with them), appeared for the Defendant, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Chelmsford*) said:—

The Appellant here undertook to prove that there was error in law in the proceedings. He has not done so, and there is not the slightest foundation for this appeal. The postea stated, that upon a certain day "a jury of the said county, being summoned, came, and who, being sworn to try the matters in question between the said parties, upon their oath say that the Defendant is not guilty." The Plaintiff in error afterwards alleged errors in fact. They were these:—That certain persons were struck to be returned as a special jury for the trial of the issue; that only some of them were summoned to attend; that the names were not called over in Court at or after the hour of ten o'clock named in the summons;

(1) 3 H. & N. 866. 4 Jur NS 1112
(2) 3 Ex. 658. 28 LJ (Ex) 36
(3) 11 Clark & F. 155.
(4) Ibid. 427.

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that only ten attended, and were sworn; that, on behalf of the Defendant, a *tales* was prayed; and that two talesmen were sworn on the jury. To this the Defendant pleaded *in nullo est erratum*, which, in fact, amounts to a demurrer: in other words, that, even admitting the facts stated in the allegation of errors to be true, there is no error on the record (1). The Court of Common Pleas so decided, upon the ground that it was not competent to the Plaintiff in error to aver anything that was inconsistent with the record. The record distinctly alleged that a jury competent and proper to try the question was summoned and assembled. What the Plaintiff in error alleges is, in substance, that the case was not tried by a proper, but by an improper jury, and his statement therefore goes to contradict the record. It is needless to consider whether what he alleges as irregularities (and they are no more) would have justified the Court in setting aside the verdict, and ordering a new trial, but it is clear that his allegations could justify nothing more than an application to the Court below for that purpose. After the judgment has been signed, they cannot justify a proceeding in error to reverse that judgment. The Court of Common Pleas, therefore, rightly affirmed the *judgment. On the affirmance of the judgment in the Court of Common Pleas the Plaintiff in error took the case to the Exchequer Chamber, where he assigned the very same errors in fact. The Court there held that "it was no ground of error, either in fact or in law, that the whole of the special jurors struck were not summoned, or that the special jury panel was called over and a *tales* prayed before ten o'clock in the morning, the time for which the special jurors were summoned, it not being competent to the party to aver anything that is inconsistent with the record."

Lord Chief Baron *Pollock*, in this case, put the judgment on the right ground when he gave this illustration of the distinction:—"If the error assigned below was, that an infant had appeared by attorney, which would be error in fact, and the Court below decided that it was not error, that which was error in fact in the Court below, would, by that erroneous decision, become error in law,

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(1) "*In nullo est erratum* is no admission of the fact assigned for error, unless it could lawfully be assigned, and is well assigned, in point of form:" *Rex* v. *Carlile* (2 B. & Ad. 362).

because the record would be wrong." Undoubtedly the holding that it was not error for an infant to appear by attorney would be error in law, and on that, so stated on the record, a writ of error would lie to the Exchequer Chamber. But that does not apply to a case where the supposed errors are mere irregularities, matters which could not be assigned as grounds of error without contradicting the record. That is the distinction between this case and the case of *O'Connell* v. *Reg.* (1), and renders that case entirely inapplicable to the present. In that case there was a challenge to the array, and then a demurrer to that challenge, and a judgment on the demurrer; so that there the whole matter appeared on the record. The challenge to the array was of course before the trial, and the question whether it was a good challenge or not, was matter of law, and was matter of law apparent on the record? Here the assignment of errors was on matter of fact, and was made after the trial, and after judgment. It is perfectly clear that such an assignment of errors cannot be maintained. There is, therefore, no ground whatever for this proceeding in error, and the judgment of the Court below must be affirmed.

LORD CRANWORTH:—

This case is so abundantly clear that I almost doubt whether I ought to add a single word to what has just been addressed to your Lordships. I consider it to be an invariable rule, and one which is founded on the very best principles, that a party, after a trial and a verdict, and a judgment thereon, is entirely precluded from raising, by a proceeding in error, any question of fact, unless there has been some error in fact in the conduct of the cause which had not been put in issue by the pleadings, and which can be alleged without being inconsistent with the record. It is within these limits alone that any question of error in fact can be brought after trial, verdict, and judgment. Is there here any such question of fact? The only question of fact attempted to be raised is this: the record states that the cause came to be tried before "a jury of the county," who, being summoned, had come, and "who, being sworn to try the matters in question between the parties, upon their oath say that the Defendant is not guilty." The Plaintiff, after verdict and judgment, alleges as error in fact that this was a special jury; that out of the forty-eight persons returned as usual, twenty-four were struck off, and twenty-four remained to constitute the special jury; that only sixteen of these were summoned, or rather that eight of them were not summoned; and that "by reason of the said parties not having been summoned to attend the Court on the trial of the said issue, and the names of the aforesaid special jurors not having been called over in Court at or after ten o'clock, which was the hour named in the said summons for the said jury to attend the Court on the trial of the said issue, twelve of the said special jurors did not attend to try the said issue," and so talesmen were sworn on the said jury.

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(1) 11 Cl. & F. 155.

Now is that, or is it not, error in fact of which a Court of error is bound to take cognizance. The record states that the jurors had been summoned; that the cause was tried by a jury; and that the jury found a verdict for the Defendant. It does not state that the jurors were all regularly summoned, and attended, and so on; but that is an alteration which has only been made in modern times, not for the purpose of altering the law, but to make the statement of the proceedings shorter and simpler. The old form was pointed out by Mr. Justice *Willes* in his very able judgment in the Court below. That form was (1): "And the jurors of that jury being summoned, some of them, that is to say, *E. F.*" &c. (naming them), "come and are sworn upon the said jury; and because the residue of the jurors of the same jury do not appear, therefore others of the bystanders being chosen by the sheriff of the county aforesaid, at the request of the said *A. B.* [or *C. D.*], and by the command of the said Chief Justice, are appointed anew, whose names are annexed to the within written panel, according to the form of the statute in that case made and provided, which said jurors so appointed anew, that is to say *G. H.*, &c. (naming them), being called, likewise come, who, together with the said other jurors before impanelled and sworn, being chosen, tried, and sworn to speak the truth of the matters within contained, say, upon their oath, that" the Defendant is not guilty. We must suppose all this to be stated upon this record, because, although it does not appear in terms, being now entered more briefly and simply, it is implied, though not expressed, on every record. That being so, the record states that the jurors were duly summoned; and then it cannot be alleged as error in fact that they were not duly summoned, for that would be inconsistent with the record.

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(1) Tidd's Forms, 315.

It is alleged that it is unjust not to allow the party to contradict the record, but it is not so. After the trial the record cannot be made up, and the judgment entered upon it, until four days of the next term have elapsed. In the meantime the party complaining of anything wrong may come to have it set right. And the cases cited by the Plaintiff in error are cases where that had been done. In such cases the Courts act on their discretion; and if no injustice has been done, or the party has acquiesced in it, they will not interfere. The course of proceeding in such cases is well illustrated by one of the cases cited by the Plaintiff in error, namely, *Curtis* v. *March* (1). There the Judge did actually sit before ten o'clock. The first case was called on; nobody appeared for the Defendant: the verdict was therefore given for the Plaintiff, the party who did appear. But at ten o'clock the Defendant was in Court, and claimed a new trial, on the ground that his case had been taken before the hour at which he was bound to be present. The Court there thought that injustice would be done if he was not allowed to be heard, and therefore a new trial was granted. That was perfectly intelligible. So it would have been here if the Plaintiff in error could have shewn the Court that there had been an irregularity, an irregularity in which he had not acquiesced, and which had caused him a prejudice. But he could allege nothing of the sort, and therefore judgment was signed in the ordinary way, and the whole proceeding was perfectly regular.

There is, however, another question, which has been already dealt with by my noble and learned friend, and that is, whether error in fact can be brought before any Court except that in which the trial and proceedings have originally been conducted. It is quite clear that you cannot have an allegation of error in fact in any other Court except that in which the cause is depending, and for this reason: if error in fact is alleged by one party, the other is

(1) 3 H. & N. 866; 4 Jur NS 1112; 28 LJ (Ex) 36.

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entitled to dispute the allegation. In this case the Defendant in error might have answered, "That is not true; the jurors were all summoned, and nothing was done before ten o'clock." The disputed facts would have to be tried, and they could only be tried in that Court where the facts were to be established. The distinction taken by the late Lord Chief Baron, and already adverted to by my noble and learned friend, is perfectly correct. If the Court in which the cause originated decided wrongly upon an error in fact, so that the decision was erroneous in point of law, and so appeared on the record, it might be brought before a Court of error, but not otherwise. These are the principles which regulate this case, and which appear to me too clear to be disputed. The judgment of the Court below must be affirmed.

Judgment for the Defendant in Error.

Lords' Journals, 22nd February, 1867.

Plaintiff in Error in Person.
Attorneys for Defendant in Error: *Raven & Bradley.*

THE PROPRIETORS, &c., OF THE GREAT WESTERN RAILWAY CO. } PLAINTIFFS IN ERROR;

AND

JOHN BENNETT . . . DEFENDANT IN ERROR.

1867
Feb. 11, 18;
March 18.

Railway Clauses Act—Mines—Subjacent and adjacent Support.

By the effect of the 77th, 78th, and 79th sections of the *Railways Clauses Consolidation Act*, 1845, a railway company on purchasing, under that statute, land for the purposes of the railway, does not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner" and "according to the usual manner of working such mines in the district." The company cannot, under this statutory purchase, claim the benefit of the right of an

4 Eq. [illegible]
5 Ch. 10, 11
4 HL 384
7 QB 266
277
8 QB 44
2 ChD 242
20 ChD 553
556-8,
561.

2 QBD 346 3 App Cas 170-3,
5 App cas 8, 24 19 ChD 562-5,
21 ChD 604, 11 QBD 823-7, 830-7, 842

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ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated.

The *Dudley Canal Company* v. *Grazebrook* (1) approved.

THIS was a proceeding on error on a judgment in the Court of Queen's Bench, which had been affirmed by the Exchequer Chamber (2).

The *Shrewsbury and Birmingham Railway Company*, under the powers of the *Shrewsbury and Birmingham Railway Act*, 1846, had acquired in fee simple certain lands lying in *Wombridge*, in the county of *Salop*, for the purpose of constructing the railway. That Act incorporated the *Lands Clauses Consolidation Act*, 1845, and the *Railways Clauses Consolidation Act*, 1845. These lands, and the *Birmingham and Shrewsbury Railway* itself, afterwards came, under the 17 & 18 Vict. c. ccxxii., to be vested in the Plaintiffs in error, who constituted the *Great Western Railway Company*.

The original conveyance, dated the 11th of September, 1849, was made by the then owners of the lands, who were also owners of the mines and minerals lying under the same, and conveyed to the *Shrewsbury Company* for the purposes of the railway, in the form given in the schedule to the *Lands Clauses Consolidation Act*, 1845, the lands, "excepting and always reserved, &c., the mines and minerals in and under the said hereditaments and premises, with all the necessary powers and privileges for getting and working the same." The railway and works were then constructed on the lands, partly on the surface, and partly in a tunnel. In the year 1856, *Bennett*, the Defendant in error, purchased the reserved mines and minerals. On the 9th of June, 1856, he gave to the Plaintiffs in error, under the 78th section of the *Railways Clauses Consolidation Act*, 1845, notice of his intention, within thirty days after the date of the notice, to work the mines and minerals lying under the railway and tunnel, and within forty yards therefrom, unless they stated their willingness to treat for compensation. On the 9th of July, 1856, the Plaintiffs in error gave *Bennett* notice of their willingness so to treat with respect to

(1) 1 B. & Ad. 59.

(2) The case was not reported in the Courts below, as judgment was given upon the authority of a previous case of *Fletcher* v. *The Great Western Railway Co*; 5 H & N 689; 6 Jur N.S. 980; 4 H & N 242.

the mines and minerals lying under so much of the lands as were coloured pink in a plan annexed. These lands lay under two ends of the line of railway and a tunnel connecting them, and on both sides of the same.

On the 1st of December, 1857, *Bennett* gave to the Plaintiffs in error notice that he was also the owner of other mines and minerals which lay under another portion of the lands (coloured blue in the plan), and situate just outside the line of the other lands, which he would, by severance, be prevented from working, and for which he also required compensation; and that he was desirous that the amount of his claim, if not agreed to, should be settled by arbitration in the manner provided in the *Railways Clauses Consolidation Act*, 1845. This claim did come under arbitration, and on the 28th of October, 1858, an award was made containing the following special finding: "Supposing that the said *John Bennett* had not been interrupted and prevented from working and getting the said mines and minerals, and had the right to work and get the whole as against the company as owners of the surface, then I find the whole of the said mines and minerals, for which compensation is hereby awarded, could properly have been worked and gotten in the manner proper and necessary for the beneficial working of the same, and according to the usual manner of working such mines and minerals in the district within which the same are situated. But I also find that no greater portion than one-third of the said mines and minerals could properly, and in such manner as aforesaid, have been so worked and gotten, if in working and getting the same a sufficient portion of the said mines and minerals was to be left to give reasonable support to the said surface land, and to prevent any damage by the sinking thereof; and I also find that the same amount of support would have been necessary for the surface land if the said railway and tunnel had not existed." The award farther declared that, in respect of the minerals lying under the land coloured pink, the Plaintiffs in error were to pay to *Bennett*, if he would have been entitled to work out the whole of them, the sum of £8649 10*s*., but that if he would have been bound to leave reasonable support to the surface, the sum of £1085 3*s*. 8*d*.; that *Bennett* was entitled to compensation for the additional loss and damage which he had incurred in respect of the other portion of

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the mines and minerals which could not be worked by reason of severance; and that the farther amount to which *Bennett* was entitled, if he would have been entitled to work out the whole of the said last-mentioned portions of mines and minerals, was £1042 7*s.* 2*d.*; but that if *Bennett* was bound to leave reasonable support, then the amount of compensation in respect of the last-mentioned mines and minerals was £140 16*s.* 7*d.*

An action was brought on this award. A special case was stated by consent, and in Michaelmas Term, 1862, the Court of Queen's Bench gave judgment in favour of *Bennett* for the two larger amounts. This judgment was given on the authority of *Fletcher* v. *Great Western Railway Company* (1). In Easter Term, 1863, the judgment was affirmed in the Exchequer Chamber. The case was then brought up to this House.

Mr. *Manisty*, Q.C., and Mr. *Field*, Q.C., for the Appellants:—

The question raised is, whether, having regard to the 77th and two following sections of the *Railways Clauses Consolidation Act*, 1845 (2), and to the deed by which the surface land was conveyed

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(1) 4 H. & N. 242 (affirmed 5 Ib. 689). The following is the marginal note of that case:—"A railway company having, by agreement with the owner, purchased land for the purpose of making the railway, and having taken a conveyance in the form given by the *Lands Clauses Consolidation Act*, 1845, Schedule A., and not being willing to purchase the minerals after notice of the owner's intention to work them, pursuant to sect. 78 of the *Railways Clauses Consolidation Act*, 1845, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them, notwithstanding that the getting of such minerals would cause the surface to subside:—*Held* accordingly, that where, under such circumstances, the company had given notice that the working of the mines was likely to damage the works of the company, the owner of the minerals was entitled to recover compensation which had been assessed under the said 78th section."

C/c 6 Jur N.S. 960.

(2) 8 & 9 Vict. c. 20 (*Railways Clauses Consolidation Act*, 1845).

Sect. 77. "The company shall not be entitled to any mines of coal, &c., under any land purchased, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased: and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Sect. 78. "If the owner, &c., of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distances, or, when no distance shall be prescribed, forty yards therefrom, be desirous of

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to the Appellants, the Defendant in error may work the mines and take the coal, leaving no support to the surface, or whether, if they had not availed themselves of the powers in the general Act, he could have removed all the coals under the railway and for forty yards on each side of it, leaving no support whatever; and finally, whether he was not bound, at all events, to leave support to the surface. In substance the point to be determined is raised by the award, and is, what is the effect or the consequence of a company availing itself of the statutes, and making a purchase of lands under their provisions?

Bennett can only claim to be paid for so much of the coal as he might take away without diminishing the reasonable support of the surface. To that the Appellants are entitled as purchasers of the surface. They would be so entitled as purchasers in the ordinary way; they are even more entitled under the provisions of the Railway Acts. He has, in the price of the land, got compensation for the surface, and having sold the surface, he is bound by law not to work his mines so as to withdraw from the surface sufficient reasonable support.

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working the same, he shall give to the company a notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines, or any part thereof, to such owner, &c., then he shall not work or get the same; and if the company and such owner, &c., do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

Sect. 79. "If before the expiration of such thirty days the company do not state their willingness to treat with such owner, &c., for the payment of such compensation, it shall be lawful for him to work the said mines, or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate: and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good by the owner, &c., at his own expense," and if that is not forthwith done by the owner the company may do it, and recover the amount by action.

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If the case had stood on the deed alone, he would have been in the condition of an ordinary owner of mines lying under the land, having reserved a power of working them. That power would have been a power reasonably to work with reference to the safety of the surface.

As there might be more danger where a railway ran over the surface than in an ordinary case, the Legislature interfered to compel an owner of the mines to give to the railway directors notice of his intention to work, either under the railway itself, or within forty yards of it; and if the company prevented his working, the company was to pay him compensation for that coal which, but for the notice, he might have taken away. But he is not entitled to be paid for coal which, even without any notice, he could not have taken away, because its removal would have been the removal of reasonable support to the surface.

The Caledonian Railway v. *Sprot* (1) laid down that doctrine in the case of a private conveyance, and is, therefore, directly applicable here. [LORD WESTBURY:—The conveyance under the statute excepts the mines and minerals; does that mean all the mines and minerals, or only so much of them as can be got with due regard to the safety or advantage of the railway company?] It has the latter meaning, as is shewn by the case of *Elliot* v. *The North Eastern Railway Company* (2), which decided that a conveyance granting land for a special purpose, must be construed as conveying all the rights necessarily incident to the due execution of that purpose. In the former of these cases, there was a private Act (7 Geo. 4, c. ciii.), by which a company had the right to take lands compulsorily, they were taken, but leave was reserved to work the mines, but the Act prohibited the proprietor who sold the surface from working the mines to the disadvantage of the company. [THE LORD CHANCELLOR:—In that case, the conveyance was dated ten years before the *Scotch Railways Act*, 1845 (8 & 9 Vict. c. 19), passed, and Lord Chancellor *Cranworth* thought that that Act did not apply.] But he recognised on any sale or grant, however made, the right of the purchaser of the surface to subjacent and adjacent support, and the positive obligation to leave it, even though there was an abso-

(1) 2 Macq. Sc. Ap. 449; 2 Jur NS 623 (2) 10 H. L. C. 333; 9 Jur NS 55

lute reservation of mines and minerals. In *Elliot* v. *The North Eastern Railway Company* (1), Lord *Chelmsford* remarked, that a company must pay for extraordinary support, which itself shewed that he thought, as Lord *Cranworth* had said, in *The Caledonian Railway* v. *Sprot*, that the company, on an ordinary purchase of land, would be entitled to ordinary support, and he also declared that whether a sale was voluntary or compulsory made no difference, for every grant carried with it the ordinary incidents of a grant, and he applied those incidents in that case, though he considered the sale to have been made under the compulsory powers of the Act of Parliament. There is nothing in this case which excludes the operation of this ordinary rule. It is perfectly clear that the purchaser of land without anything to exclude the operation of the common law, would be entitled to reasonable support of the surface: *Harris* v. *Ryding* (2); though there the reservation of the mines, and of the right and means to work them, was in very general and extensive terms. *Smart* v. *Morton* (3), *Roberts* v. *Haines* (4), *Humphries* v. *Brogden* (5); shew that the language of deeds before the Act was at least as strong in favour of the owner of the mines, as the language of the sections in the statute, and, consequently, that the sections could not be construed as affecting, certainly not as diminishing, the common law right to support on the surface. And *Backhouse* v. *Bonomi* (6) establishes that it is the duty of a mine owner, even where he has the clearest right to work the mine, to leave sufficient support to the surface. In that way, those cases may fairly be taken as interpreters of the statute.

But there certainly was a difference with respect to one matter, and that difference is in favour of the Appellants. The common law required that reasonable support should be afforded, but there was no precise limit fixed within which that support must be given. Now railway works might require more support than works of an ordinary kind, and so the 78th section gave a distance of forty yards within which mines must not be worked, except after certain notices had been given. But, though that section gave a company the power to treat for the purchase of the right

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(1) 10 H. L. C. 333, 9 Jur. N.S. 555.
(2) 5 M. & W. 60.
(3) 5 E. & B. 30, 1 Jur. N.S. 825.
(4) 6 E. & B. 643; 2 Jur. N.S. 229; 7 E. & B. 625. 3 Jur. N.S. 806.
(5) 12 Q. B. 739.
(6) 9 H. L. C. 503.

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to work the mines, there was no power in a company to compel the sale of that right. Yet it never could have been the intention of the Legislature to expose railways to greater danger than houses built in the ordinary way on the surface of land covering mines. The section must, therefore, be construed with reference to the cases previously decided upon common law rights, and then it is obvious that that which the common law gave the statute had not taken away.

Mr. *Mellish*, Q.C., and Mr. *Hannen* (Mr. *Crompton* was with them), for the Respondent:—

The real question here, is the construction of the three sections of the *Railways Clauses Act.* The effect attributed to an ordinary conveyance of the surface may be admitted, and, according to the case of *The Caledonian Railway* v. *Sprot* (1), that may apply in the case of a conveyance to a railway as much as to any other. But the Courts have distinguished between the two classes of cases, and have held that the effect of the *Railways Clauses Act* is to postpone the compensation to the mine owner till he comes within a certain distance of the railway. The object was fair to both parties. The owner was not to lose his property if there were mines; the railway company was not to pay for them if they were not found to exist, or if they were not worked or about to be worked. Here they did exist, and were intended to be worked. A large quantity of coal was required for the support of the railway works. It cannot be contended that the mere sale of the surface bound the mine owner to make such a sacrifice of the coal lying under it, without proper compensation. A part might be got here without injury, the mine owner was entitled to get that part, or if prevented from getting it, must be compensated for it. He was also entitled to get that part, the getting of which might, without improper working, be considered injurious to the works of the railway. This latter was to be subject of notice and compensation. In *The Caledonian Railway Company* v. *Sprot* (1), the whole of the compensation was really paid at the time of making the purchase; it was not so here. There is no pretence for saying that so much of the minerals as are under or near the railway were purchased at the time the surface was purchased; yet such is, in effect, the argument on the other side. That is contrary to common sense, and to the interpretation put by the Courts on the sections of the statute.

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(1) 2 Macq. Sc. Ap. Cas. 449; 2 Jur. N.S 623.

What was the rule regulating the right to get the minerals before this *Railways Clauses Act* was passed? In *The Dudley Canal Company* v. *Grazebrook* (1) there was a special proviso that in working the mine no injury was to be done to the navigation. Those words were stronger than any to be found in these Acts, but the Court said that they meant no unnecessary, no extraordinary damage. [THE LORD CHANCELLOR:—But the Appellants say that they have got the right to reasonable support, that by law they are entitled to it, and that the Respondent has no right to take it away.] But the answer to that general allegation is the other general allegation, that the owner is always entitled to work his mines in the ordinary and usual mode; and that is all that is proposed to be done here. The practical result of overruling those decisions, which have established his general right, would be to give to railway companies the means, by a mere purchase of the surface, to possess themselves of the most valuable minerals without paying for them at all.

The provisions of the statute which require notice to the company of the intention to work the mine, and which give the company the right to inspect the working, so as to see whether any damage is likely to arise, shew distinctly that in purchasing the surface the company obtained the surface and nothing more, and if it desired to obtain more must proceed under the 78th and 79th sections, and must compensate the mine owner for the additional rights taken from him. If the right to get the minerals was already gone, there was no necessity for the insertion of these provisions. Nor was there any need to guard against the improper working of the mines if the owner was not entitled to work them at all. The use of the word "proper" shews that the mine owner was entitled to work the mines, and pointed out the mode and manner in which he was to work them. The 78th and 79th sections do but render effectual the exception contained in the 77th section, which would otherwise be illusory and absurd.

(1) 1 B. & Ad. 59.

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The case of *Fletcher* v. *The Great Western Railway* (1) was properly decided, and is directly in point here. There it was insisted that the company was to be protected against damage from any working whatever. The special case found that the working would have taken away the support, and the question was, whether the mine owner was, under these circumstances, entitled to compensation for what he would lose if prevented from working the mine. It was held that he was, and that decision was, after full argument on error, confirmed in the Exchequer Chamber.

The case of *The Caledonian Railway Company* v. *Sprot* (2) was on an Act of Parliament entirely different from the present, and is inapplicable here. *Elliot* v. *The North Eastern Railway Company* (3) is more complicated, but the same observation applies there.

Here, as the grant of the surface is by the statute, and the conveyance is expressly made subject to the rights of the owner of the mines, who is authorized to work them by all proper and necessary means, the simple question here is one of the construction of the words of the 79th section. The word "improper" was meant only to protect a railway company against the wanton exercise of the rights of an owner of mines whose rights were thus reserved. If the work is properly conducted he is entitled to work the mines, or to compensation if the company desires him to abstain from working them.

This question has lately, and since the case of *Fletcher* v. *The Great Western Railway Company*, been under consideration in the Court of Chancery, and a decision has been pronounced upon it by Vice-Chancellor *Wood* in the case of *The North Western Railway Company* v. *Ackroyd* (4), where it was held that the owner of land granting to a railway company the right to make and maintain a tunnel, was in the same position with respect to his right to work mines, under the sections of the *Railways Clauses Act*, as if the land had been purchased, and under them he was held entitled to work the mines, and a bill filed to require the owner of the mines to leave sufficient subjacent and adjacent support was dismissed. In the case of *The Wyrley Canal Company* v. *Bradley* (5), a Canal

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(1) 4 H. & N. 242; 5 H. & N. 689. 6 Jur. N.S. 961.

(2) 2 Macq. Sc. Ap. 449; 2 Jur. N.S. 623

(3) 10 H. L. C. 333; 9 Jur. N.S. 555.

(4) 31 L. J. (Ch.) 588; 8 Jur. N.S. 911

(5) 7 East, 368.

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Act, like the *Railways Clauses Act,* excluded the company from purchasing mines under the canal, and reserved to the owner the power to work them after giving notice, the company having power to stop the working on paying compensation. It was there held that the right to work was left as before the Act if, after notice given, the company did not purchase the owner's rights. The case of *The Dudley Canal Company* v. *Grazebrook* (1) followed, and then came *The Stourbridge Canal Company* v. *The Earl of Dudley* (2), where clauses similar to these existed, and in both it was held that the owner of the mines was entitled to work them in the usual and ordinary manner, though damage might ensue from his so doing, if, after notice, compensation were not made to him. These authorities are decisive as to the construction which ought to be put on the sections of the statute in the present case.

Mr. *Manisty,* replied.

March 18. THE LORD CHANCELLOR (Lord *Chelmsford*) :—

11 QBD

My Lords, this writ of error is virtually brought upon the decision of the Court of Exchequer and the Court of Exchequer Chamber in the case of *Fletcher* v. *The Great Western Railway Company,* as upon the authority of that case the present one was decided without argument.

The question to be determined is, whether the Plaintiffs in error having purchased the lands of the Defendant in error for the purpose of constructing a portion of their railway, and the conveyance to them containing an exception of "the mines and minerals in and under the hereditaments and premises, with all the necessary powers and privileges for getting and working the same," the Plaintiffs in error are entitled to sufficient support to the railway from the portion of the mines and minerals lying under or adjoining the same, without being bound to make compensation to the Defendant in error.

The question depends entirely upon the clauses contained in the *Railways Clauses Consolidation Act,* 1845, under the heading, "with respect to mines lying under or near the railway," beginning with sect. 77. This will at once render inapplicable the two cases of *The Caledonian Railway Company* v. *Sprot* (1), and *Elliot* v. *The Directors of the North Eastern Railway Company* (2), decided in this House, neither of which decisions turned upon the sections in question.

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(1) 1 B. & Ad. 59.

(2) 3 E. & E. 409.

11 QBD 831

By the 77th section of the *Railways Clauses Consolidation Act*, a railway company is not "to be entitled to any mines of coal, ironstone, slate, or other minerals, under any lands purchased by them, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased." The provision contained in this section is extremely beneficial to railway companies. They are not to have any mines or minerals, that is (any part of the mines or minerals) under the land purchased by them; but they may secure sufficient support to the railway by purchasing it from the owner of the mines, or, if they think it likely that the mines under the railway may not be worked for an indefinite period, they may postpone the purchase until the necessity for it arises.

20 ChD 559

That this section reserves to the mine owner all the minerals, however near they may be to the surface, unless the company chooses to purchase them, appears very clearly from the exception of "the parts necessary to be dug, or carried away, or used in the construction of the company's works," as these will, of course, be the minerals lying nearest to the surface. But if the company desires to postpone the purchase of the mines until it is known that they are to be worked, the company is enabled to do so, with perfect safety, from the protection afforded by the 78th section, which compels the mine owner whose mines lie under the railway, or within a certain distance of it, who is desirous of working the same, "to give thirty days' notice of his intention, and the company may then cause the mines to be inspected, and if it appear that the working of the mines is likely to damage the railway, and if the company be willing to make compensation for the mines to the owner, he shall not work or get the same." This section appears to me to leave the mine owner to work his mines exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to make him com-

11 QBD 836

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(1) 2 Macq. Sc. Ap. 449; 2 Jur. N.S. 623 (2) 10 H. L. C. 333; 9 Jur. N.S. 555

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7 QB 277

pensation. If the company should not, within thirty days, state the willingness to treat with the mine owner for the payment of compensation, he is, by the 79th section, left at liberty to work the mines, "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district." But to guard railway companies, under these circumstances, against any unfair mode of working the mines to their prejudice, it is provided by the same section that "if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the owner shall repair and make it good." And the 83rd section gives the company power "to ascertain whether the mines are being worked, or have been worked, so as to damage the railway or works."

The mine owner, therefore, may work his mines in a manner beneficial to himself, in order to win the largest quantity of minerals that the mine will yield, but so as not to depart from the usual manner of working in the district.

As to the obligation imposed upon the mine owner to make good any damage occasioned by his improper working of the mines, if the argument of the Plaintiffs in error is correct, that the company is, from the first, entitled to a sufficient support to the railway from the mines, every working which diminishes that support must be improper. It then becomes difficult to understand how any case can arise for the application of the provisions of the 78th section. If the working of the mines and minerals is likely to produce damage to the works of the railway, it must be by taking away the support to which the company is supposed to be entitled; but then, instead of the company being required to make compensation to prevent the owner from working at all, any working would be improper, and the owner would be compellable, under the 79th section, to make good, at his own expense, any damage done.

The case of *The Dudley Canal Company* v. *Grazebrook* (1), appears to me to be a strong authority in favour of the construction of the sections of the *Railways Clauses Consolidation Act* which I have adopted.

I am, therefore, of opinion that the judgment of the Court below ought to be affirmed.

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(1) 1 B. & Ad. 59.

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8 QB 44,
2 QBD. 346
9 ChD 567.
11 QBD 832

LORD CRANWORTH:—

My Lords, I have very little to add to what has fallen from my noble and learned friend. Independently of the statute, I think the contention of the company would have been unanswerable. I should be extremely sorry if this case should at all bring into doubt the doctrine which was enunciated and acted upon by this House in the case of *The Caledonian Railway Company* v. *Sprot*, which doctrine is this:—that if I sell my land for the purpose of a railway being made upon it, I impliedly sell all necessary support, both subjacent and adjacent, that is required for the purpose of supporting that railway. In the case of *The Caledonian Railway Company* v. *Sprot*, the conclusion at which this House arrived was, that although the sale of the land was one which might have been compelled, probably, under the statutes then in force (not the present statute, because it was before the passing of the statute now in force), yet, in truth, it was a mere contract between Mr. *Sprot* and the company, and must be dealt with just as if no statute existed. But the difficulties which had arisen upon this subject were, I presume, what gave rise to these provisions of the *Railways Clauses Act* which are now under discussion.

20 ChD 539.
11 QBD 836

It was obviously the intention of the Legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines, sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for the purpose of the railway, the company was to take (and it was a very beneficial provision for the company), that, and that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with, whenever the time for working the mine should arrive. It is plain to me, upon the construction of that clause of the statute, that that was the intention of the Legislature; and that intention is fully carried into effect by giving to the mine owner, in this case the Respondent, Mr. *Bennett*, that which the Court below has given to him, namely, the full right in all the mines which he worked, just as if he had not sold the surface.

8 Q.B. 44

I think, therefore, the judgment below is perfectly right, and that, consequently, judgment ought to be given for the Defendant in error.

LORD WESTBURY:—

19 ChD 56
11 QBD 82

My Lords, this case presents no difficulty when the true relation between the railway company and the mine owner, as settled by the statute, is once ascertained. A railway company is under no obligation, I should rather say, is under a disability, to purchase mines unopened, mines lying beneath the land required for the railway. They are absolutely reserved and excepted out of the conveyance to be made by the landowner to the company. The chief argument for the present Appellants, embodied in their Second Reason, that the conveyance grants to the company as much as is requisite for the support of the railway, is entirely taken away by the 77th section of the statute. In that section it is positively declared that "all such mines, excepting as aforesaid" —that is, except the small portion of minerals which may be disturbed or brought to bank by the operation of making the railway —"all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." In the face of these words there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted.

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Then what relation remains between the railway company and the mine owner? It is defined by the statute. Although the

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mines *in solido* are, without any exception, reserved to the mine owner, he is not at liberty to win them, or to proceed to get them without notice to the railway company. That notice expires after a month. During that month the railway company is under an obligation to ascertain whether it may be requisite, for the support of the railway, to purchase any part of the subjacent minerals. If the company should not think it requisite, the mine owner is left under no other obligation than that he is to win the mines in a proper manner; and if there is a custom of the country it must be done according to that custom; and the railway company is armed with authority to inspect the working from time to time, in order to ascertain whether any damage is likely to ensue, or whether any proceeding of the mine owner is inconsistent with the ordinary beneficial manner of winning the minerals. The relation, therefore, between the railway company and the mine owner is one so clearly defined, so useful to the railway company, and at the same time so fair and just to the mine owner, that one is astonished that any argument could have been raised upon the ordinary implication applicable to a grant, which is so entirely excluded by the express enactment of the statute, and also by the accompanying provisions that define, beyond the possibility of mistake, the true relation which, after the land has been conveyed to the railway company, continues to exist between the company and the mine owner. There can be no doubt that the decision of the Court below is right; and I entirely concur with my noble and learned friends, that the judgment must be affirmed.

Judgment affirmed.

Lords' Journals, 18th March, 1867.

Attorneys for the Plaintiffs in Error: *Maples & Teesdale.*

Attorneys for the Defendants in Error: *Hollings, Sharpe, & Ullithorne.*

THE EARL OF DARNLEY . . . . APPELLANT;
AND
THE PROPRIETORS, &c. OF THE LONDON, CHATHAM, AND DOVER RAILWAY . . . RESPONDENTS.

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Feb. 25, 26, 28;
March 1, 4, 21

20 Eq 109

Agreement—Time—Condition Precedent—Waiver—General Rights under Railway Acts.

A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances.

Where there has been an agreement between two parties, giving power to a third to make, within a certain time, an award on a matter in difference between them, if the award is not made within the specified time, but one of the parties, not knowing that fact, takes it up and pays the charge for it, his doing so will not amount to a waiver of the condition as to time contained in the agreement.

Quære. Whether taking up an award known to have been made after the limited time, would amount to an admission that the arbitrator's authority had not expired.

Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly shew, not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding.

Where a person has made a special agreement as to crossings on a line of railway running through his land, if, from particular circumstances that agreement is not carried into effect, he cannot, on the ground of any general rights, claim to have other crossings made, according to the discretion of the Court, for that would be to get the Court to substitute a new agreement, not to enforce the performance of the original.

THIS was an appeal against two orders of the Lord Justices, by the first of which they had reversed an order of Vice-Chancellor *Stuart* made in favour of the Plaintiff (now the Appellant), but gave him leave to amend his bill, and this having been done, and the Vice-Chancellor having again pronounced a decree in his favour, the Lords Justices reversed it, and dismissed the bill.

The Appellant is the owner of the estate of *Cobham Hall*, near *Rochester*. The Respondents formerly constituted the *East Kent Railway Company*, and in June, 1858, were prosecuting in Parliament a bill for an extension line, which was intended to run through about four miles of the Appellant's estate. The Appellant opposed the passing of this bill. An agreement was entered into by the respective parties, in consequence of which the Appellant's opposition was withdrawn. In the negotiations which led to this agreement, and in the management of the matters which followed, Mr. *John Clutton* acted on behalf of the Appellant, and Mr. *Oakley*, the surveyor and land agent of the Respondents, instructed by Messrs. *Freshfields & Newman*, the solicitors of the Respondents, acted on their behalf. On the 22nd of June, 1858, *Oakley* signed a preliminary memorandum containing the heads of an agreement, and undertook that the seal of the company should be affixed to an agreement to carry out the same before the bill was read a third time in the House of Lords. Accordingly an agreement, dated the 22nd of June, 1858, was, on the 29th of that month, formally executed by the Appellant and the Respondents. The only articles of this agreement material to be mentioned are the 10th and the 13th. By the 10th article the Respondents agreed "to make and maintain, for the convenience of the Earl's estate, so many crossings across the extension railway, and of such kinds, whether above, below, or on the level, as Mr. *John Clutton*, or him failing, the engineer or surveyor of the Earl, his heirs or assigns, shall within one month (1), after obtaining possession of the land of the Earl, direct and notify in writing to the company or their engineer." By the 13th article the Respondents agreed "to perform and observe articles 3 to 11, both inclusive, respectively, if these articles respectively shall have effect, to the reasonable satisfaction in all respects of Mr. *John Clutton*, or him failing, of a competent surveyor to be named by the Right Honourable *Edward Cardwell*."

In the early part of October, 1858, the extension line was marked through the Appellant's property, and on the 15th of that month Mr. *Cubitt*, the engineer in chief of the Respondents, sent Mr. *Clutton* a plan and section of the line. On the 9th of November Mr. *Clutton* went over the ground, and marked in pencil on the plan the crossings he proposed, and among others "a cattle arch X." It did not appear that the plan so marked with this arch was communicated to Mr. *Cubitt*. On the 16th of November an

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(1) This article, as originally drawn, stated the time as two months. The solicitors for the Respondents, in settling the draft, altered it to one month, and this alteration was acceded to by the Appellant's representatives.

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interview took place between these gentlemen, and what then occurred was the subject of much discussion. Mr. *Cubitt* alleged that he understood that Mr. *Clutton* then finally determined the number of the crossings (the cattle arch X. not then being mentioned) and their position, whether above, below, or on a level with the line, although some details were left for farther consideration. These details appeared to have been arranged by verbal communications and by notes between the parties. On the other hand, Mr. *Clutton* alleged that he understood that no final determination was then arrived at as to what crossings should be made, but that the matter was still open for his decision. Which was the correct interpretation of what occurred at the meeting depended on many minute statements, which were afterwards fully noticed in the judgment. The Respondents took actual possession of the land on the 7th of December, 1858; and on the 23rd of that month Mr. *Clutton* wrote to Mr. *Oakley* a letter, in which he said, "Under the agreement with his Lordship I am enabled only to direct crossings. To avoid some expensive crossings Mr. *Cubitt* has suggested some alterations which will involve the making of roads. I should be glad of some guarantie that my directions as to the roads shall be executed by the company, if I alter the line of communication to meet the wishes of the company." On the following day Mr. *Oakley* wrote an answer, "If you adopt the suggestion of the company's engineer as to some of the communications, and by such course find it right that some roads should be constructed by the company, I have no hesitation in saying that the company will carry out your suggestion at their cost. I shall be very glad to have your award in this matter, as I cannot yet arrange with the two *Parkers*, and am anxious to be able to say practically what communications they will have." On the 5th of March, 1859, Mr. *Clutton* made his certificate or award, the last article of which directed a crossing in these terms, "X. Cattle arch for removal of brick earth." On the same day he gave notice to the agents that they might have his award on the payment of his fees, £40. This was not then done, and in June Mr. *Clutton* wrote to call attention to the fact that the award had not been taken up, and to request Mr. *Oakley* to "arrange for this being done, and the amount of my charges being settled." Mr. *Oakley* sent this

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request to Messrs. *Freshfields,* the solicitors for the Respondents, who forwarded a cheque for the £40. The embankment had been by that time completed, and the "cattle arch" could not be made without a new and additional expense being incurred. The Respondents refused to incur it. The Appellant, in December, 1860, filed his bill, which, after setting forth the facts as alleged by the Appellant, prayed that the Defendants might be compelled to perform the agreement of June, 1858, and to make the works comprised in, and described by, the award of the 5th of March, 1859, and in particular to construct the cattle arch at the point X., indicated by, the award and the maps and plans annexed thereto.

Evidence was taken to the effect already stated, and the cause came on for hearing before Vice-Chancellor *Stuart,* who was of opinion that Lord *Darnley* was entitled, on the award, to specific performance, and made an order accordingly. That order was, on appeal, reversed by the Lords Justices, who, however, gave the Earl leave to amend his bill (1), and put in issue any claim he might consider himself to have under the agreement, or upon matters arising thereout, or connected therewith. The bill was amended and, in addition to the prayer for specific performance of the agreement of June, 1858, the bill prayed that in case the Court should be of opinion that the Respondents were not bound by the direction or award of Mr. *Clutton,* that they might be decreed to make and maintain all such crossings across the railway, &c., and of such kinds, whether above, below, or on a level, as might be necessary or proper for the convenient and advantageous use and enjoyment of the lands of the Appellant, which had been severed or intersected by the railway.

The Vice-Chancellor, upon this amended bill, made a decree in favour of the Appellant, which was, on appeal, reversed by the Lord Justices, who ordered the bill to stand dismissed (2). This appeal was then brought.

Mr. *Bacon,* Q.C., and Mr. *Speed,* for the Appellant:—

The Respondents are bound to execute the contract according to the directions of the award made in pursuance of it. Time is

(1) 1 De G. J. & S. 204; 9 Jur N.S. 452.

(2) 3 De G. J. & S. 24; 11 Jur N.S. 520

not here of the essence of the contract, as it is in a case where the doing of one act is the consideration for the performance of another. Here the arrangement as to time was a mere matter of convenience, and could not affect the rights of the Appellant under the agreement, for a contract between a railway company and a private person is not to be judged by the same rules as are applicable to a contract between two private individuals. The provisions of the *Railways Clauses Act* (8 & 9 Vict. c. 20, ss. 68 and 69) oblige companies to make accommodation works, and give justices the power to order them. That itself shews the distinction taken by the Legislature between companies and private individuals, and in these sections there is no limitation whatever as to the time when such orders may be made. The contract here merely substitutes Mr. *Clutton* for the justices, and must, so far, be regarded as if the claim to have the works made was rested on these sections of the statute.

But even if time had been of the essence of the contract, the stipulation regarding it could be waived by the conduct of the parties. That may be so even in the case of making an award under special terms of reference, as well as in other cases. *Hawkesworth* v. *Brammall* (1); *In re Hick* (2); *King* v. *Wilson* (3); *Cutts* v. *Thodey* (4); *Hipwell* v. *Knight* (5). The payment of the fee for the award so long after the time within which, as it is now said, it could alone be properly made, is itself a clear proof that the limitation of time had been waived.

Specific performance is a matter of discretion with the Court, to be determined on the circumstances of the case, and will not be refused because the party seeking it has not done something within the time fixed by agreement, unless the act omitted really bore the character of a condition precedent. In *Seton* v. *Slade* (6) specific performance was decreed, though the abstract of title had not been delivered within time, it having been received and kept without objection. The principle adopted was, that the Court was not fettered by the mere words of the agreement, but would carry the real intentions of the parties into effect. The same principle

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(1) 5 My. & Cr. 281, 295.
(2) 8 Taunt. 694.
(3) 6 Beav. 124.
(4) 13 Sim. 206.
(5) 1 Y. & C. Ex. 401.
(6) 7 Ves. 265.

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was acted on in various cases, and under different circumstances, in *Gregory* v. *Mighell* (1); in *Gourlay* v. *The Duke of Somerset* (2), where a reference to the Master was substituted for a reference to *J. G.*, to settle the terms of the lease; and in *Sanderson* v. *The Cockermouth Railway Company* (3), where, though the objection was raised that the contract must be construed solely with reference to the *Railways Clauses Consolidation Act*, the Court gave a reasonable construction to the terms of the agreement, and directed the Master to ascertain what roads, ways, and slips for cattle were necessary and proper within the meaning of the agreement. *Lytton* v. *The Great Northern Railway* (4) is to the same effect.

The Appellant here is not to be deprived of his rights merely because the certificate was not made within the time limited by the agreement. *Scott* v. *Avery* (5) shews that a reference to the opinion of a third person does not put an end to the jurisdiction of the Courts. If the Appellant has not a claim to specific performance of the agreement, his general right to have convenient and proper approaches and communications still remains, and the decree of the Vice-Chancellor in his favour is, in that respect, fully warranted.

The evidence here shews that the meeting of the 16th of November was not a final proceeding. There was no intention on either side to adhere strictly to the limited time, for it was for the mutual convenience and advantage of the parties that the details of the work should, from time to time, be (as they were, in fact, made) the subject of friendly arrangement. The conduct of the Respondents' agents amounted to a waiver of the limitation as to time, and their acts were binding on the Respondents: *The Duke of Beaufort* v. *Neeld* (6).

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Respondents:—

The real question here is, whether the Respondents are to be forced, by a decree for specific performance, to make a cattle arch when the time for making it has entirely gone by, and, through

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(1) 18 Ves. 328.
(2) 19 Ves. 429.
(3) 11 Beav. 497; 2 H. & T. 327.
(4) 2 K. & J. 394; 2 Jur. N.S. 436.
(5) 5 H. L. C. 811; 2 Jur. N.S. 815.
(6) 12 Cl. & F. 248, 273.

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the negligence of *Clutton* to make the certificate in proper time, the Respondents have been allowed to form their embankments under the idea that no cattle arch was required. Time is here of the essence of the contract. The Appellant seeks specific performance of a written agreement, yet he impeaches, or tries to avoid, one of its conditions. He cannot, though the Defendant in a suit of this kind may, do that: *Townshend* v. *Stangroom* (1); *Woollam* v. *Hearn* (2). Here a power of a particular kind was given to one person, to be exercised by him within a settled limit of time. He, and he alone, could exercise it, and he allowed that limit to pass away without doing anything; he thus permitted, if not encouraged, the Respondents to go on with their work; and now it is sought to expose them to the expense of undoing that work, because, long after the agreed time has gone by, he thinks fit to claim the right of exercising the special power with which he had been intrusted. The case of *The Duke of Beaufort* v. *Neeld* (3) does not apply here, for there the agent was a general agent for all the purposes connected with the exchange of the lands, and the papers sent to the Duke, if properly examined by him, would have informed him of all that was proposed to be done. Here *Clutton* was intrusted with a special power, to be exercised within a definite time; and neither within that time, nor for long afterwards, was any information conveyed to the Respondents that he had exercised the power on this particular point, or that he desired to reserve the exercise of it to a later period. There was, therefore, no waiver of the obligation to make the certificate within the time fixed. [The facts were very fully gone into, for the purpose of establishing this proposition.] The payment of the fee by the solicitors, who knew nothing about the date of the award, was no act of waiver. The cases cited on the point of waiver are all inapplicable here.

The case of *Gregory* v. *Mighell* (4) is not in point. There a rent was to be fixed; possession of the premises had been taken for years, and money expended on them; and, as one of the parties would not agree in appointing the persons who were to fix the rent, the Court ordered the Master to do so; and all the evidence

(1) 6 Ves. 328.
(2) 7 Ves. 211.
(3) 12 Cl. & F. 248.
(4) 18 Ves. 328.

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shewed that the Plaintiff there had exactly performed all that he had agreed to perform. Even farther from being in point is *Gourlay* v. *The Duke of Somerset* (1), for there the Court simply refused to compel a reference to a private individual to declare what were usual and proper covenants in a lease, the agency of this private individual not being deemed of the essence of the contract. But in this latter case there is an observation of the Master of the Rolls which may be quoted in favour of the Respondents, for he says (2) "Where the agreement is that the price of the estate shall be fixed by arbitrators, and they do not fix it, there is no contract, as the price is of the essence of a contract of sale; and the Court cannot make a contract where there is none." So here, there was a power in *Clutton* to direct the making of the cattle arch, if he gave his direction in a fixed time. That time was of the essence of the contract, and no direction whatever having been then given, the Court, if it introduced a new period of time, would be making a contract where there was none, which it will not do. On the other hand, the case of *Milnes* v. *Gery* (3) does bear strongly on the present. There the agreement was, to sell one third part of a certain property, at a price calculated on the value which should be set on the entirety of the hereditaments by two persons to be named. The persons were named, but could not agree, and no value was ever fixed. The Court there refused to decree specific performance, considering the price to be of the essence of the contract, and holding that it had no power to appoint another person to fix that price. *Scott* v. *Avery* (4) shews that, where there is a reference to an arbitrator, the due making of the award is a condition precedent to any proceedings or matters which formed the subject of the reference. And *Scott* v. *The Corporation of Liverpool* (5) is even a still stronger case. There the corporation undertook, by covenant, that if certain things were done, the Plaintiffs should be paid for them as the engineer should certify; and it was held that neither at law nor in equity did any demand arise until a certificate had been given. The earlier case of *Hawksworth* v. *Bram-*

(1) 19 Ves. 429.

(2) Ibid. 431.

(3) 14 Ves. 400.

(4) 5 H. L. C. 811; 2 Jur N.S. 81

(5) 3 De G & J. 334; 5 Jur N.S. 105

mall (1) had not raised any difficulty about the doctrine, for there the facts shewed that the parties had mutually abandoned the specific terms of the agreement. Where that is not so, and it is not so here, they must govern the rights of the parties.

Mr. *Bacon*, replied.

March 21. THE LORD CHANCELLOR (Lord *Chelmsford*), after stating the nature of the suit, the agreement, and the decisions in the Courts below, said:—

Considerable discussion took place at the bar as to whether time was of the essence of the tenth article of the agreement. It would, perhaps, be a more correct expression of the question to state it in this form: whether it was not essential to the Appellant's right to have such crossings as Mr. *Clutton* should direct, that he should notify to the Respondents, or their engineer, his direction as to the crossings required within one month after their obtaining possession of the Appellant's land? It appears to me to be clear that the Respondents did not agree to make any other than such crossings. Therefore, if there was a failure to notify the number and nature of the crossings, the Appellant was not entitled to any under the agreement, and was thrown upon his rights under the Acts of Parliament for such crossings as the Respondents might be required to make, independently of all agreement. The 13th article has nothing to do with the limitation of time. The works, of course, could not be commenced until it was notified what the crossings were to be; but the 10th article was (with others) to be performed to the satisfaction of *Clutton*, and in the progress of the works he would have, from time to time, to superintend, and, perhaps, occasionally to control, the execution of them, and even to direct them to be altered if he was not satisfied with them. Of course it was competent to the Respondents to enter into a fresh agreement to give the Apellant the requisite crossings, although his right to insist upon them had been lost, in consequence of their not having been notified within the limited time, and such an agreement might be inferred from the conduct of the Respondents, or their authorized agents, without its being expressly proved.

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(1) 5 My. & Cr. 281.

It is not pretended that there was any express agreement on the part of the Respondents to give the Appellant the crossings which he would have been entitled to if they had been notified in due time; but it is asserted that such an agreement must be inferred from the conduct of the agents of the Respondents after the time mentioned in the 10th article had expired. Whether this inference can be drawn from what took place on their part is the principal question upon the appeal.

The Respondents took possession of the Appellant's land on the 7th of December, 1858. The notification of the crossings to be made by the company was not ready for delivery till the 5th of March, long after the time prescribed by the agreement. It was insisted on behalf of the Appellant that, although the time had thus elapsed, yet the Respondents, with full knowledge of the fact, went on negotiating through their agents upon the subject of the crossings, and as to the mode of carrying them out; shewing (as it was said) that they had no intention that the expiration of the month from the time of their taking possession of the Appellant's land, should deprive him of the crossings which they had agreed to make.

This necessarily introduces the questions:—1. What crossings had been specified as those which would be required? 2. Who were the agents of the Respondents? And, 3. What were their acts, by which the Respondents are said to have been bound?

Under the first head the important question is, whether the cattle arch X. was ever understood and arranged to be one of the crossings which *Clutton* would certainly require before his formal notification in writing to the company on the 5th of March, 1859.

The evidence shews that a meeting took place at the office of Mr. *Cubitt*, the engineer of the Respondents, on the 16th of November, 1858, at which meeting there were present, besides Mr. *Cubitt* himself, his co-engineer, Mr. *Turner*, Mr. *Oakley*, and Mr. *Clutton*.

In the previous month of October, *Clutton* had received from *Cubitt* a plan and section of the part of the railway which was intended to pass through the Appellant's estate. *Oakley* had, in the month of June previously, lent *Clutton* a plan, shewing the position and extent of the brick earth in the Appellant's land which would be crossed by the line of railway. *Clutton* had obtained a copy of the parliamentary plan (which was an exhibit in the suit, and marked AA.) and upon it he had marked the place of brick earth upon the estate, from the plan lent to him by *Oakley*. On the part of the Appellant it was contended that this plan AA. was that which was received by *Clutton* from *Cubitt*, and was the one produced at the meeting of the 16th November, 1858; and, therefore, that the cattle arch which would be required for the passing of the brick earth must necessarily have been referred to. On the other hand, it is quite clear that the plan AA. could not have been the plan and section sent by *Cubitt* to *Clutton*, for *Cubitt* states expressly that he sent it on the 15th of October, 1858; and *Clutton*, in his deposition, says that his impression is, that he marked the brick earth on the plan AA. in or about June, 1858. *Clutton* also says he has no doubt that he had exhibit AA. with him at the meeting, but he does not swear that he produced it upon that occasion. Independently of the plans, the subject of the cattle arch may have been introduced at this meeting; but I do not find that *Clutton* says that he mentioned it to *Cubitt*, or even to *Oakley*, whom he considers the proper person, as the managing agent of the Respondents, to communicate with on the subject of crossings. He distinctly says, "I do not remember having any conversation with *Cubitt* about the opening for the brick earth. I only consulted him upon points when I had any difficulty, or thought I could save the company expense. This was the reason why I did not talk to him about the crossing at X." *Cubitt* distinctly swears that the cattle arch X. was not one of the accommodation works directed by *Clutton* at the meeting of the 16th of November, 1858. And *Oakley* swears that "no conversation ever passed between him and *Clutton* on the subject of an opening with reference to brick earth." *Cubitt* believed and understood that at the meeting of the 16th of November, 1858, *Clutton* finally determined the number of crossings which he, under the 10th article of the agreement, was to direct, and whether they were to be bridges, or on a level. And farther, that

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"at this meeting *Clutton* did not produce any plan or document in which the cattle arch X. was marked, nor was mention made of the cattle arch X., and *Clutton* never intimated in any way that he considered the cattle arch to be requisite or desirable." *Clutton* "positively denies that he either finally decided or finally agreed upon any communications at this meeting." *Cubitt*, however, made a memorandum in pencil of the crossings required by *Clutton* upon this occasion. This memorandum, which is an exhibit in the suit, is, unfortunately, not in the same state in which it was when originally written, and the alleged unauthorized insertion of a single word has occasioned some difficulty respecting it.

The memorandum, as it originally stood, is in these words: "*Wickham Farm Road*, at 1·42. A bridge considered indispensable, the ground to be examined with a view to select a site for the same, and section taken." It has now the word "under" interlined between the words "bridge" and "considered," and after the word "considered" the words "by *Clutton*" are inserted. These latter words are believed by *Cubitt* to be in his handwriting. With respect to the addition of the word "under," which would make the memorandum expressly refer to a cattle arch, the evidence is far from satisfactory. *Edis*, in the employ of *Cubitt*, says he believes the word "under" is in his handwriting. That, subsequently to the 16th of November, 1858, he had occasion to prepare a list of the bridges under the *Western Extension* line, and it is possible (though he cannot remember the fact) that, erroneously assuming at the moment (without referring to the plans of the railway in order to ascertain the level of the ground where the extension railway would cross the *Wickham Farm Road*) that the *Wickham Farm Road* would pass under the railway, he inserted the word "under," intending to remove it when the list was prepared. He adds, that it was not inserted by him with the direction or with the knowledge of *Cubitt*, which *Cubitt* himself expressly confirms.

The Appellant, naturally enough, lays great stress upon the insertion of this word "under" in the memorandum, as proof that the cattle arch X., to which alone it is said it can possibly refer, must have been mentioned at the meeting of the 16th of November, 1858, or shortly afterwards. I have already shewn that there is no evidence on the part of the Plaintiff that the cattle arch was mentioned at this meeting, but positive evidence to the contrary; and this latter evidence is strongly corroborated by the original form of the memorandum, which, as it stood at first, could not possibly be taken to contain any reference to a cattle arch. This, however, was contested on the part of the Appellant, and it was said "that the memorandum must have been intended to refer to a crossing through the embankment, and not to a bridge over the *Wickham Farm Road*, because the ground was to be examined and a section taken; which would be quite unnecessary to fix the site of a bridge, but essential for the purpose of making an opening in an embankment." *Cubitt*, however, states, that "it was necessary for the purpose of fixing the site of the bridge that the ground should be examined and a section taken, to enable *Clutton* and himself to select the course, and determine the gradient of the new road, and that if the cattle arch X. had been one of the crossings, it would have been unnecessary to examine the ground, or take a section with a view to its construction, or for the purpose of fixing the position thereof." It is a strong confirmation of this evidence that one of the exhibits contains a plan and section for the bridge over the *Wickham Farm Road*, but no sections appear to have been taken as to the cattle arch.

As a fact, depending upon the evidence, I am satisfied that the cattle arch X. was not mentioned at the meeting of the 16th of November, 1858, or at any time before the period fixed for the notification by *Clutton* of the crossings to be made by the company. Whether the silence of *Clutton* on the subject arose from his believing that *Cubitt* and *Oakley* would see the necessity for an opening through the embankment without its being pointed out to them, or from some other cause, is immaterial.

The notification by *Clutton* that the cattle arch would be one of the openings required, having been made in what may be called his award of the 5th of March, 1859; the next question to be considered is, whether the limitation of time in the 10th article of the agreement of the 22nd of June, 1858, was waived by the Respondents, and the parties afterwards proceeded upon an undertanding that *Clutton* might notify the number and nature of the

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crossings necessary for the Appellant's accommodation at some future time. The Appellant insists that by the acts of the agents of the Respondents they are precluded from objecting that *Clutton's* notification was made beyond the stipulated time, and that consequently he has no right to claim any crossings under the agreement.

Upon the question of agency, I think that both *Cubitt*, the engineer, and *Oakley*, the land agent and surveyor of the Respondents, were authorized to act for them in those transactions with *Clutton* upon which the Appellant relies for proof that the time for notifying the crossings which the Respondents were to make was waived by the consent of both parties. The acts of *Cubitt* and of *Oakley*, therefore, may be taken to have precisely the same effect as if they were the acts of the Respondents.

Now it must be borne in mind that *Cubitt*, certainly, and *Oakley*, probably, believed all the crossings which would be directed by *Clutton* were finally arranged at the meeting of the 16th of November, 1858, and that the cattle arch X. was not amongst them. The works to be done were thus supposed to have been substantially agreed upon, and the communications between *Cubitt*, and *Oakley*, and *Clutton*, were principally as to the mode of executing these works, or as to the alterations to be made in them, so as to save expense to the Respondents.

Before the time when the crossings were to be directed by *Clutton*, a correspondence had taken place upon the subject of some proposed alterations. On the 23rd of December, 1858, *Clutton* wrote the letter to *Oakley*, which was answered by him on the following day (1). *Oakley* deposes "that he was acting for the company upon this occasion, and he considers that he had authority from the company to write this answer to *Clutton's* letter." The communications which took place after the time within which *Clutton* was to notify the requisite crossings had expired, appear to have related to the matters contained in these letters, and, at all events, they had no reference to anything except what was mentioned at the meeting of the 16th of November, 1858, and noted in *Cubitt's* memorandum.

It appears to me that it was quite competent to the Respondents

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(1) For both letters, see *ante*, p. 45.

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to enter into arrangements how any particular crossing, understood to be resolved upon by *Clutton*, should be executed, and even varied, without entailing upon them the consequence of having crossings introduced and insisted upon which had not before been suggested. Assuming, therefore, the authority of *Cubitt* and *Oakley* to act for the Respondents as they did act, it did not in my judgment operate as an enlargement of the time within which *Clutton* was to notify his decision as to the number and nature of the crossings, or enable him to direct the cattle arch to be made after his authority had terminated. Nor do I think that there is any ground for alleging a waiver of the time, from the fact of the solicitors to the Respondents having paid the charges of *Clutton*, and taken up what is called his award, made after his authority had expired.

This is not at all like the case (1) which was cited in argument, where arbitrators not having duly enlarged the time for making the award, the parties notwithstanding attended meetings, and were thereby held to have recognised their authority as continuing. I should very much doubt whether taking up an award, known to have been made after the limited time, would amount to an admission that the arbitrator's authority had not expired. But the present case is very different from those. There is great doubt whether the Respondents' solicitors received the letter of *Clutton* as to his charges, which is stated to have been sent by *Oakley* to them on the 7th of March, two days after *Clutton*'s award. But assuming that the solicitors knew at that time that *Clutton* had not made his award till then, and that when they heard in June from *Oakley* that "the award as to crossings, &c., had been waiting to be taken up for some months," they also knew that it had not been in existence until after the time fixed by the agreement; yet I cannot think that their act in receiving it and paying *Clutton*'s charges can have the effect of waiving all objection in point of time. A waiver must be an intentional act with knowledge. If Messrs. *Freshfields & Newman* knew, as they appear to have believed, that the crossings had been all arranged on the 16th of November, 1858, and believed that the cattle arch was not amongst the number, it would be a matter of indifference whether the crossings were formally notified at the time agreed upon, as they would naturally expect them to be confined entirely to those which had been previously mentioned. I am at a loss to imagine, under these circumstances, how the act of the solicitors in taking up the award can deprive the Respondents of their right to object that the cattle arch was not specified within the proper time, when they had no reason to expect that any reference to it would be found in the award. The Respondents might be quite willing to accept a formal determination upon matters previously settled, though not given in time, but not to acquiesce in the direction of new works which they never understood nor expected would be required.

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(1) *In re Hick*, 8 Taunt. 694.

The Appellant, assuming that his rights might be held to be concluded under the agreement, asks, in the prayer of his amended bill, that the Respondents might be decreed to make and maintain all such crossings as may be necessary or proper for the convenient and advantageous use and enjoyment of his lands. But I apprehend Lord Justice *Turner* was perfectly right in saying that the Court had no power to make such a decree. The Respondents agreed to leave themselves entirely at the discretion of *Clutton* as to the crossings to be notified to them within a specified time. If the time was permitted to pass without such a notification there was an end of the rights conferred by the agreement. The Court could have no power, when the rights under the agreement were lost, to substitute for the discretion of *Clutton* its own discretion as to the crossings necessary or proper for the convenient and advantageous use and enjoyment of the Appellant's lands.

The right under the agreement having expired, the Appellant was entitled, under the 68th and 69th sections of the *Railways Clauses Consolidation Act*, to compel the making of convenient and necessary accommodation works in the manner therein directed. The five years' limitation, however, assigned to proceedings under the Act has long since passed. But this can make no difference in the judgment which the House must pronounce upon the Appellant's rights, whether depending upon agreement or upon the statute.

I think that the Lords Justices' decree ought to be affirmed, and, I am afraid I must add, with costs.

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LORD CRANWORTH:—

My Lords, it is certain that Mr. *Clutton* did not literally comply with the terms of the agreement. The Respondents obtained possession of the Earl's land on the 7th of December, 1858, and Mr. *Clutton* did not within one month from that day direct and notify in writing what crossings he required them to make across their line. The only written direction and notification which he made was made on the 5th of March, 1859, being nearly three months, instead of one month, after the Respondents had got possession of the land. It was, therefore, impossible for Lord *Darnley* to obtain a decree for specific performance of the agreement on the ground that Mr. *Clutton* had, in the stipulated mode and at the stipulated time, indicated what was to be done.

It was argued, however, that relief ought to be given on one of two grounds: either that the agreement did not mean to make the one month an essential condition of the contract; or, if it did, then that the parties had waived that part of the condition, and substituted a new contract, according to which *Clutton's* directions were to be valid if given within a reasonable time, and that they were in fact given in writing as soon as, according to what must be treated as a substituted agreement, they could be given.

On the first point it is unnecessary to say more than that the circumstances indicate a very clear intention on the part of the contracting parties to make time an essential part of the contract. The evidence shews that it is of great importance to a company about to construct a railway, to know, as early as possible, what crossings and other accommodation works will be required for the convenience of those whose lands border on the intended line. The original proposal in this case was, that two months should be allowed to Mr. *Clutton* for deciding what accommodation works were necessary; but the Respondents, by their solicitors, expressly stipulated that one month only, and not two, should be allowed. One month was accordingly fixed on as the time within which Mr. *Clutton* was to exercise his function. In the face of this evidence I cannot entertain a doubt that, as the directions were not given by Mr. *Clutton* within one month, he failed to perform that which was in substance, as well as in terms, a condition precedent under the agreement.

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20 Eq 109

The more doubtful question is, whether the parties did not so conduct themselves as to justify the Appellant in believing that the Respondents had waived that part of the agreement which fixed one month from the 7th of December as the time within which the written directions were to be given, and had agreed to substitute for the definite period of one month a reasonable time after certain matters discussed between Mr. *Clutton* and Mr. *Cubitt* had been settled.

I should not have been sorry if I could put this construction on the acts of the parties, but I am unable to do so. That the parties must be taken to have adopted a mode of ascertaining the necessary crossings different from that stipulated for in the agreement, I do not doubt; but the question is, what was the mode which was to be substituted. The Appellant says that the original agreement was to remain in force except for the accommodation given to the Respondents. Mr. *Clutton* entered, as to certain points, into protracted negotiations with their agents, and so, necessarily, for their convenience, and with their concurrence, postponed the time within which, by the strict terms of the agreement, he ought to have given his written directions. But I think the Appellant fails to establish any such substituted agreement. It may be that Mr. *Clutton* supposed he was to retain all the powers which were conferred on him by the agreement, notwithstanding the failure as to the time; but that is not the question. When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to shew, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding—that both parties were proceeding on a new agreement, the terms of which they both understood. Now here the Appellant fails to satisfy me that Mr. *Cubitt*, who represented the Respondents, supposed, after the meeting of the 16th of November, 1858, or had reason to believe that Mr. *Clutton* supposed, that the 10th article of the agreement was no longer to have validity. I am satisfied that Mr. *Cubitt* supposed that the arrangement as to crossings, to which he and Mr. *Clutton* came at that meeting, were to be taken to be the final demands to be made by Mr. *Clutton* on behalf of the Appellant, subject only to the settlement of the few disputed points which were afterwards arranged by communications between him and Mr. *Clutton*. If, indeed, before the expiration of a month from the 7th of December, 1858, when possession of the land was taken by the Respondents, Mr. *Clutton* had made a written direction, according to the 10th article of the agreement, requiring the formation of the cattle arch, that direction would have been valid, unless the Respondents could succeed in shewing that the Appellant had agreed to substitute some verbal agreement for that contained in the written agreement of 22nd of June, 1858. But no such written direction was given. The Appellant admits that both parties departed from the strict terms of the original agreement; and it is on him to shew that the Respondents have not performed the agreement which they, by Mr. *Cubitt*, their agent, agreed to substitute for it. This, in my opinion, he has failed to do; for he has failed to shew that the Respondents agreed to substitute for the terms of the written agreement anything else than the terms verbally agreed on at the meeting of the 16th of November, 1858, and subsequently modified, from time to time, up to the 15th of February, 1859.

I must add, that I cannot, on the evidence, believe that any mention was made, at the November meeting, of the cattle arch in question. Mr. *Cubitt* positively denies that Mr. *Clutton* produced the plan on which it was marked, or ever alluded to the cattle arch, either in the conversations which then took place, or at any other time before June, 1859. Though Mr. *Clutton* says that he had with him, at that meeting, the Plan AA., on which the cattle arch was marked, he does not say that it was ever produced or shewn to Mr. *Cubitt*, or that the subject of the cattle arch was ever mentioned to him.

I confess it is with reluctance that I have arrived at this conclusion. I should have been glad if the facts had warranted the Court in giving relief to the Appellant; but I concur with the Lords Justices in the opinion that they do not. Both parties shewed by their conduct that they did not intend to act on the strict terms of the written agreement; but no definite terms were agreed on as to what was to be substituted for it. The Court is left to discover that solely from the conduct of the parties; and that is quite as consistent with the understanding of Mr. *Cubitt* as of Mr. *Clutton.*

With respect to the prayer in the amended bill, that the Court should give to the Plaintiff relief independently of Mr. *Clutton's* written direction, by compelling the Respondents to make the cattle arch, as being a necessary or proper crossing, I concur with what was said by Lord Justice *Turner*. The jurisdiction of the Court of Chancery was limited to the enforcing of the agreement of the parties; and there was no agreement as to any crossings except such as Mr. *Clutton* should require. To substitute for that agreement an agreement to give all necessary and proper crossings, would be to make a new agreement, into which the parties never entered; not to enforce that by which alone they bound themselves.

I concur with my noble and learned friend in thinking that this appeal ought to be dismissed, and, I regret to add, dismissed with costs.

Decrees and orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 21st March, 1867.

Solicitors for the Appellant: *C. & H. Bell.*
Solicitors for the Respondents: *Freshfields & Newman.*

THE RIGHT HON. LORD LILFORD . . . . APPELLANT;
AND
THE ATTORNEY-GENERAL. . . . . RESPONDENT.

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March 22, 25.

Succession Duty—Continuing Interest.

4 H.L. 48
4 H&C 435

A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him, by the exercise of the power which that interest gives him, to render it perpetual.

Therefore, where a tenant in tail executed a disentailing deed, and died before any instalment of duty under the *Succession Duties Act* (16 & 17 Vict. c. 51) became due, and his son and devisee (who but for the deed would have been the next tenant in tail) succeeded to the property, he was held liable to satisfy the duty which his father ought to have paid. The interest of the father became, under such circumstances, according to the proviso in the 21st section of the statute, a "continuing interest," of which the father was "competent to dispose by will," and the duty was a "continuing charge on such interest."

THIS was an appeal against a decree of the Court of Exchequer, made in a revenue cause on an information filed by the Attorney-General, on a claim under the *Succession Duty Act*.

Peter Legh, of *Lyme*, in the county of *Chester*, by his will, dated the 9th of October, 1787, devised his manors of *Bratherton* and *Tarlton*, and all his messuages, &c., there, to trustees for successive tenants for life (remainders to their issue), the first of whom was testator's grandson, *George Anthony Keck*, and the last of whom was testator's grandaughter, *Henrietta Atherton*. The testator in May, 1791, revoked these devises, and devised all his said hereditaments to his sister *Ann Legh*, her heirs and assigns for ever. He died on the 20th of May, 1792, and in July of that year *Ann Legh*, by indentures of lease and release, conveyed to the same persons who had been named trustees in the testator's will of 1787, the same hereditaments for the same uses and trusts as were contained in that will.

George Anthony Keck, the first tenant for life under the will, entered into possession, and so continued till 1860, when he died without issue. All the intermediate persons named as tenants for life (and the issue of such of them as had issue), had died in the meantime, and *Thomas Atherton* Lord *Lilford*, the first son of last-named tenant for life, the testator's granddaughter *Henrietta*, became, in September, 1860, by the dispositions in the will and the indentures, tenant in tail male in possession. On the 5th of November, 1860, by a disentailing deed, he made himself tenant in fee. By a will, dated in February, 1841, he had devised all his estates in *Great Britain*, to which he was entitled in fee, in possession, reversion, or remainder, to his eldest son *Thomas Littleton Powys*, and this will was in full force at the time of his death, which happened in March, 1861. His death occurring so soon after he had entered into possession of the *Legh* estate, no instalment of the duty in respect of the succession under the will of 1787, or the indentures of 1792, had become due. *Thomas Littleton Powys*, now Lord *Lilford* (the Appellant), entered into possession on the death of his father, and application was made to him for payment of succession duty at the rate of £1 per cent. in respect of his own succession, and also for payment of the other duty at the rate of £3 per cent. in respect of what was due from his father. The Appellant refused to pay the instalments of the duty in respect of his father's succession, alleging that they ceased to be payable on the death of his father. The information was filed to enforce payment. The question of his liability depended on the construction of the 21st section of the *Succession Duty Act* (1). Three of the Barons of the Court of Exchequer delivered their opinions in favour of the claim of the Crown, the Lord Chief Baron being dissentient (2). This appeal was then brought.

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(1) 16 & 17 Vict. c. 51, s. 21, enacts, "that the interest of every successor, except as herein provided, in real property, shall be considered of the value of an annuity equal to the annual value of such property" after making certain deductions, "and the duty chargeable thereon shall be paid by eight half-yearly instalments, the first at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable," and the others at intervals of six months each: Provided that "if the successor shall die before all such instalments shall have become due, then any instalment not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest."

(2) 3 H. & C. 239, 10 Jur NS 1080

Mr. *Cotton*, Q.C. (Mr. *J. Brown*, Q.C., was with him), for the Appellant:—

It cannot properly be said that Lord *Lilford* had a continuing interest, or was competent to dispose of it. The time for determining those matters is that at which he succeeded to the property. At that time he was only tenant for life. The liability to duty extends only to an interest in property coming to a man at a particular moment, and his interest in the property alone is charged, and not the property itself. The 5th section shews the distinction that exists between the two things. The 18th section, in like manner, charges the duty in respect of the interest in the property, not in respect of the property. It follows, therefore, that a man with an estate for life, which is a limited interest, cannot have the same interest as a man succeeding to an estate in fee, for the duty is not chargeable on the real estate, but on his interest in that estate, and the first part of the 21st section distinctly shews that to be the case. The annual value of the property, that is its income, not the value of the property, the *corpus*, is taken as the basis of the calculation of the duty. Then again, the 20th section makes the duty payable when the person becomes entitled in possession to his succession, which is not the property itself, but, as the section describes it, "the receipt of the income and profits thereof." A man might have been in possession of the property before the Act, but after that the property might have been discharged of a charge upon it, he would then become liable to duty in respect of that increased value of the property as a succession, and as an interest in the succession, but not in respect of any increased value in the land itself. The 42nd section repeats the same distinction, when it enacts that the duty shall be a first charge "on the interest of the successor," and of all persons claiming in his right, in all real property in respect whereof such duty shall be assessed. The true mode, therefore, of construing the Act is to see what is the interest a party takes when the succession comes to him. So construing the Act, it is clear that the late Lord did not dispose of a continuing interest, for at the time the succession came to him he had no continuing, but only a life interest, and was not competent to dispose of any continuing interest by will. The charge on his life interest ceased with his death. The charge might be a charge on such interest as Lord *Lilford* succeeded to, but it was not a charge on the land itself. The Act deals with a person who has, on his succession happening, and in virtue of that succession, a power to appoint, but not with one who creates to himself that power. A tenant in tail cannot, as such, dispose of the estate by will, but he gets that power by destroying the estate tail and creating a new estate. It was that new estate which the late Lord disposed of by will, and to which the Appellant succeeded. The general expressions in the 2nd section justify this interpretion.

The words, "competent to dispose by will of a continuing interest," must then be construed with reference to the word property, a continuing interest in the property. The words, "continuing interest," must refer to an interest which he acquires by way of succession, and so acquires that that same interest will continue after his death, and may, by his will, receive a special destination by being devised to a particular person. That was not the case here.

The *Attorney-General* (Sir *J. Rolt*), the *Solicitor-General* (Sir *J. B. Karslake*) (Mr. *Pemberton* was with them), for the Crown:—

There is an absolute obligation imposed by the statute to pay a duty on succession to an estate. Whether that estate is a fee simple or fee tail, makes no difference in respect of this liability. There is one exception in the 21st section, and that is in favour of the man whose interest in the property cannot be continued after his death. Where it can continue, and he is competent to dispose of it, the liability continues. It continues a first charge on all persons taking property in his right. [Lord Westbury:—Here the time for payment of an instalment had not arrived. The charge, therefore, would cease, except in the case of a "continuing interest," what is that?] It is an interest which does not absolutely expire with the possessor, but may be disposed of by him. Such an interest was in this case possessed by the late Lord *Lilford*. But for the proviso in the 21st section the duty would have been a charge upon the property, and on any person who took the property through him. That proviso does not relieve the property from the charge.

There is no difference in the construction of the statute between "property" and "interest." The word "interest" does not mean the quality of the estate, but the *corpus*. The two words are used indifferently in the statute, and the 34th section, which refuses an allowance upon incumbrances created by the successor himself, grants it in respect of money expended in improvements. That shews that the *corpus* of the property, not the individual's special interest in it, is the subject of the charge.

The competency of the successor is not to be limited to the moment at which the succession first opens to him, nor can it be said that, having then only an estate tail, he was not competent to dispose of his interest by will.

An estate tail is substantially, and, especially for the purposes of this taxation, an estate in fee, for the tenant in tail can at his will bar the remainders, and make himself the owner in fee. That is not done by the acquisition of a new interest, but by virtue of the interest to which he first succeeded.

In construing this statute mere forms and technicalities are to be disregarded, as Lord *Campbell* stated in *Lord Saltoun* v. *The Advocate-General* (1), and again in *Lord Braybrooke* v. *The Attorney-General* (2). He afterwards observed that the fact that the successor varies the nature of the estate, as by barring an estate tail and making himself owner of the fee, will not vary his liability to the duty (3), the latter proposition being distinctly affirmed by Lord *Kingsdown* in the same case (4). *The Attorney-General* v. *Floyer* (5) is to the same effect. So that even if the argument, that the charge is not on the property, but on the interest in it, could be sustained, the result would be the same. It is clear, however, that the duty is chargeable upon the property, as is shewn by the provision in the 21st section, which declares that "the instalments unpaid at his death shall be a continuing charge on such interests in exoneration of his other property." Here the expressions are used as synonymous. The tenant for life, if he lived for the four half years mentioned in the section, would be liable to pay all the instalments, and the tenant in fee, if he lived for forty years, would have to pay no more. The statute makes no distinction between them. The word "competent" has received a construction in *The Attorney-General* v. *Hallett* (1); it means competent by interest in the property, not competent by personal capacity. The interest here, the estate tail, was taken by the late Lord, and that identical interest was, by his act, converted into a fee, of which he was competent to dispose, as of a continuing interest, and the duty thereon attached. The act of so converting it did not vary his liability.

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(1) 3 Macq. Sc. Ap. Cas. 671; 6 Jur. N.S. 713.
(2) 9 H. L. C. 165; 7 Jur. N.S. 741, 742.
(3) 9 H. L. C. 170; 7 Jur. N.S. 743.
(4) Ibid. 181; 7 Jur. N.S. 745.
(5) 9 H. L. C. 447; 9 Jur. N.S. 1.

Mr. *Cotton*, in reply:—

The case of *Lord Braybrooke* v. *The Attorney-General* (2) and *The Attorney-General* v. *Floyer* (3) do not apply to the present. They merely determined who was the "predecessor," namely, the original settlor. That has nothing to do with this case.

March 25. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, this is an appeal from a decree of the Court of Exchequer upon an information filed against the Appellant for non-payment of succession duty.

The question of the liability of the Appellant depends upon the construction of the 21st section of the 16 & 17 Vict. c. 51, the *Succession Duty Act*, 1853. That section, after enacting how the interest of every successor to real property is to be valued, and making the duty chargeable by eight instalments, provided that if the successor shall die before the instalments are due, then any instalments not due at his death shall cease to be payable, "except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time being of such interest."

It is alleged by the Crown that Lord *Lilford* is the owner of a continuing interest in the property charged with the duty, which the former successor was competent to dispose of by will within the meaning of this section.

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(1) 2 H. & N. 368.

(2) 9 H. L. C. 150; 7 Jur N.S. 741

(3) Ibid. 477; 9 Jur N.S. 1

Lord *Lilford*, the father of the Appellant, in the month of October, 1860, became beneficially entitled in succession to the real property in question as tenant in tail male in possession, and became chargeable with succession duty in respect thereof. On the 5th of November, 1860, he executed a disentailing deed, and limited the inheritance to the use of himself in fee. He died on the 15th of March, 1861, before any one of the instalments of duty payable in respect of his succession had become due, having by will, dated the 24th of February, 1841, devised the property to his son, the Appellant, for life, with limitations over.

The language of the 21st section is not so clear as to render the construction of it altogether free from difficulty. But a careful examination of it has enabled me to ascertain the meaning of the Legislature to my own satisfaction. "The interest of the successor," upon which the value is to be set, and the instalments to be charged, is of course the particular interest in the property to which he succeeds. The duty is payable by him in respect of such interest. If he dies before any or all of the instalments of the duty are paid, and his interest is not transmissible, but ceases at his death, the liability must also cease. By the 42nd section of the Act the duty imposed is to be "a first charge on the interest of the successor, and of all persons claiming in his right." But in the case supposed, the next successor will claim in a different right. Where, however, the successor is able to transmit the interest in the property on which the duty is charged, and he either disposes of it by will, or allows it to pass to a person who succeeds to it by right, the duty remains a continuing charge upon the interest by the express words of the 42nd section.

These considerations appear to me to remove the difficulties which exist if we confine our attention to the 21st section alone. The words, "except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property," can apply only to the particular interest on which the duty has been charged, and which goes with the charge to the next successor. The meaning, then, of the expression "continuing interest" will be "the interest on which the duty is a charge." This will appear more clearly from the context, for the section proceeds, in which case the instalments unpaid at his death shall be "a continuing charge" (shewing that reference is made to a charge already commenced) "in exoneration of his other property, and shall be payable by the owner for the time being of such interest;" that is, of the interest of which the successor was competent to dispose, "and in respect whereof the duty was assessed."

Having determined the construction of the section in question, it only remains to consider whether the Appellant is the owner of the interest upon which the duty had become a charge. Now, the interest to which the father of the Appellant succeeded, and in respect of which the duty was assessed, was an estate of which he was actual tenant in tail, and which, in the words of the 15th section of the *Abolition of Fines and Recoveries Act*, gave him full power to "dispose of the lands entailed for an estate in fee simple, absolute or for any less estate." The disentailing deed did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him, to render it perpetual. The Appellant's father was therefore competent to dispose by will of the interest in the property upon which the duty was charged, and the duty is a continuing charge on such interest devised to the Appellant by his father's will.

The decree of the Court of Exchequer must be affirmed.

LORD CRANWORTH:—

My Lords, I have only to say, shortly, that I concur with my noble and learned friend in the opinion which he has expressed.

The power of barring the entail, and so becoming competent to dispose of the property by will, was incident to the estate tail which Lord *Lilford* took under the will of *Peter Legh*. And, therefore, when he executed the disentailing deed in November, 1860, and so became the owner in fee simple, he may be treated as having, in the language of the 21st clause, been competent to dispose by will of a continuing interest in the property. He may be treated, for the purpose of succession duty, as if he had been a devisee of the fee simple. He was competent to dispose by will of an interest in the property coming from the predecessor to him and continuing to his devisees.

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LORD LILFORD
v.
ATTORNEY-GENERAL.

LORD COLONSAY:—

My Lords, for the purposes of this case, I think the reasons which have been assigned by your Lordships are perfectly satisfactory in support of the conclusion arrived at. It appears to me that the interest which Lord *Lilford* took was an interest, though only of a tenant in tail, which had in it a certain potentiality which ripened into a power to dispose of the estate, and to give a continuing interest to his successor. It was part of the quality of the succession; and being part of the quality of succession, and he having exercised that power, or being competent to exercise that power, it must be considered that he was in the predicament which the statute contemplates. Upon these grounds I think that the decree of the Court below should be affirmed.

Decree affirmed; and appeal dismissed with costs.

Lords' Journals, 25th March, 1867.

Solicitors for the Appellant: *Frere, Cholmeley, & Forster.*
Solicitor for the Respondent: *Solicitor for the Inland Revenue.*

LORD J. L. CHICHESTER AND WIFE . . . APPELLANTS;
AND
THE HON. AND REV. T. COVENTRY AND OTHERS . RESPONDENTS.

1867
March 25, 26;
May 14.

Settlement—Will—Ademption—Satisfaction.

The question whether a gift in a will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a will, is one of intention.

[illegible]

The rule that there is a presumption against double portions is founded on the assumption, that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the first. This rule is much easier of application where the will precedes the settlement than where the settlement precedes the will. In the latter case, the intention to satisfy a covenant must be distinctly expressed, or clearly indicated. Great differences in the sums given, and in the limitations of the trusts on which they are given, will be taken as indications that the gift in the will was not meant in satisfaction of the covenant. Where, too, the gift by the will is not to the child, but to trustees to pay debts and legacies, and then to pay the residue to the

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LORD CHICHESTER v. COVENTRY.

4 Eq 509, 510
513, -5,

6 Eq 10, 11

16 Eq 263-7,

17 Eq 84

18 Eq 597, 604-5,

19 Eq 357

CLD. 402-4
407-8,

CLD. 591

CLD 671-5
678-9

CLD 83.

child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared.

Per LORD ROMILLY :—There is a marked distinction between "ademption" and "satisfaction." In the former, the benefit is given by a revocable instrument, and in any future gift the giver may declare his pleasure as to the second gift being taken in substitution for the first. In the case of the gift by settlement, followed by a will, the persons to be benefited have the right to elect which of the gifts they will take—a right which does not arise in the other case.

B., on the marriage of his daughter, covenanted by settlement to pay to the trustees, three months after demand, £10,000 for the uses of the marriage, with interest till payment. The principal sum was not demanded in his life, but the interest was paid. He afterwards made a will, giving his property to trustees, "in the first place to pay his debts and legacies, &c.," and then to divide the residue into equal moieties, and to transfer the same to his daughters. The trusts created by the will were very different from those created by the settlement :—

Held, that the gift by the will was not a satisfaction of the covenant in the settlement, and that the £10,000 must be deducted from the testator's assets before the residue was divided into moieties.

IN the year 1844, Mr. *Henry Bevan*, on the approaching marriage of his daughter, *Caroline Mary* (now Lady *John Chichester*, and one of the Appellants), became a party to her marriage settlement (1), by which he covenanted to pay to the trustees of the settlement a sum of £10,000 within three calendar months after demand thereof in writing, and in the meantime interest at the rate of £3 per cent. per annum thereon, from the date of the settlement. He also covenanted to pay annually to the trustees of the settlement £1700, so as, with the said interest, to make a sum of £2000 a year, the whole to be settled on the trusts thereinafter declared. The trusts were, during the joint lives of Lord *J. Chichester* and *Caroline Mary Bevan*, to pay her £200 a year for pin money for her separate use, free from the control or debts of her husband, and then to pay the residue to Lord *John*, and after the decease of either, to pay the whole income to the survivor, and after the decease of the survivor to pay the whole income, as therein directed, to the children. If no child, and *Caroline Mary Bevan* should survive Lord *John*, then to her absolutely; if she died in his lifetime, then as she should by will (notwithstanding coverture) appoint; and, in default of appointment, to her next of kin. There never had been any child of this marriage.

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(1) The lady had above £7000 of her own, and that sum, and a sum of £10,000 coming from Lord *John Chichester*, were brought into settlement, but they had no bearing on the case in discussion.

The principal sum was never demanded in the life of Mr. *Bevan*, but interest on it had been regularly paid, and the sum of £1700 a year had also been paid according to the provisions in the settlement.

In 1859 Mr. *Bevan* made his will. His only children were Lady *Caroline Mary Chichester*, and her sister, Mrs. *Louisa Harriet Paul*. Mrs. *Paul*, who was living separate from her husband, had two sons. Mr. *Bevan*, by his will, appointed the Hon. and Rev. *T. Coventry* and Mr. *Fladgate* his trustees. After certain pecuniary bequests, he gave a house at *Twickenham* to Lady *John Chichester*, and a house in *Hamilton Place* to Mrs. *Paul*, both to be independent of the control of their husbands, and then gave his pictures (except certain pictures specifically mentioned) to be divided into two equal parts—each daughter, beginning with the elder, to select one in turn till all were taken. In neither case was the husband to have any control over the same. He then directed his jewels, wines, carriages, and horses, to be equally divided between the daughters; and gave all his real and personal estate to his trustees, in the first place "to satisfy his just debts, funeral expenses, and legacies," and to invest the residue in parliamentary stocks or real securities, and, during the lives of the daughters, with their consent in writing, without the control of their husbands, to vary the investments, and to pay one moiety of the interest of the trust moneys to Lady *Caroline Mary Chichester* for her sole use, independent of her husband; and after her decease, in case Lord *John Chichester* should be living, on trust for such persons (other than Lord *John*, so that he should neither directly nor indirectly take any interest under any appointment) as she should appoint. In case he should die in her lifetime, then to her appointment generally. The testator made exactly similar provisions with respect to his other daughter, Mrs. *Paul*, as to the other moiety of the residue. If no appointment was made by either lady, the residue in each case was to go to the testator's nephew, *Charles James Bevan*. And lastly, he declared his express intention to be, that no part of his will should be construed to give any interest in his estate and effects to Lord *John Chichester* or Mr. *Paul* in their own right or in the right of his daughters. And he declared that in case any part of his effects, or any interest therein, should be adjudged by any construction of his will, or by operation of law, to be liable to be vested in Lord *John Chichester*, or in Mr. *Paul*, he gave such part, &c., to his trustees in trust for his nephew, Mr. *Charles James Bevan.*

The testator died in September, 1860, and the residue bequeathed by his will was very considerable.

The Appellants claimed to have the £10,000 secured by the settlement paid and invested, and then that Lady *John Chichester* should receive one equal moiety of the residue. The Respondent, Mrs. *Paul*, insisted that Lady *John Chichester* was not entitled to both the £10,000 and a moiety of what would then be residue, but was only entitled to half the gross residue before payment of that specific sum.

The trustees filed their bill in Chancery, praying for directions to carry the will into effect. All necessary parties having appeared, the cause was heard before Vice-Chancellor Sir *W. Page Wood*, who, by his decree, dated the 2nd of March, 1864, declared that Lady *John Chichester* was not entitled to the benefit given her by the will in one moiety of the testator's estate, without first deducting therefrom the £10,000 secured by the settlement (1). On appeal, this decree was, on the 3rd of August, 1864, affirmed in the Lords Justices' Court, Lord Justice *Knight Bruce* agreeing with the Vice-Chancellor; Lord Justice *Turner, diss.* (2)

This appeal was then brought.

The *Attorney-General* (Sir *J. Rolt*), and Mr. *H. F. Bristowe*, for the Appellants:—

The settlement created a debt due from the testator, which must come out of his estate before any residue could be ascertained, and on which, till it was discharged, interest was payable. With the full knowledge of the existence of this debt, he made his will, and, before disposing of his property, expressly directed, as the first act of his executors, the payment of his debts. In the £10,000 covenanted by the settlement to be paid to the trustees of the marriage, Lord *John* had a direct interest, in the moiety of the residue given by the will he had none. The provisions of the settlement of the will and the interests taken under them were entirely different from each other. The daughter had not by the will power to appoint anything to her husband. Considering all these essential differences between the settlement and the will, it is impossible to suppose that one can be treated as a satisfaction of the other.

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(1) 2 H. & M. 149.
10 Jur NS 435.

(2) 2 De G. J. & S. 336.
10 Jur NS. 896

Though there is a presumption against double portions, yet that presumption may be rebutted by intrinsic evidence from the nature of the two provisions, or by extrinsic evidence: *Weall* v. *Rice* (1). There is no such presumption in the law of *Scotland: Kippen* v. *Darley* (2); and the intention of satisfaction must be found on the face of the deeds themselves. But in *England* the intention may be established by circumstances. The principle of the rule in *England* was stated by Lord *Eldon* in *Trimmer* v. *Bayne* (3), and the distinction explained between a gift by will, followed by a settlement, and a covenant in a settlement followed by a will. There a will first gave a legacy of £5000, and by a settlement afterwards made £2000 were given, and £5000 covenanted to be paid on the death of the testator. His Lordship then said: "The rule is settled that where a parent, or a person *in loco parentis*, gives a legacy as a portion, and afterwards, upon marriage, or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will; and this Court will presume he meant to satisfy the one by the other. It differs from the performance or satisfaction of a covenant in this,—that the Court overlooks small differences in the circumstances of that which is proposed to be given, and that in satisfaction of which it is contended to be given. The Court does not inquire whether the portion by the will is entirely and absolutely to the child; or what is afterwards advanced in this form,—a settlement upon marriage, which, not being a performance or satisfaction of a debt, yet is a personal satisfaction of the intended portion." A legacy might be a satisfaction of a debt, where the will did not contain a previous direction to pay debts, but would not be so where there was such a direction; for that direction would expressly provide for the debt, independently of anything else, and would shew the distinction between the money given in satisfaction, and the money given independently of it. *Monck* v. *Monck* (1) does not affect this case, for there the will was made first, and the settlement afterwards. So in *Lord Durham* v. *Wharton* (2) the will preceded the settlement, and on the facts there, this House did not consider that there was anything to exclude the ordinary presumption of ademption [THE LORD CHANCELLOR:—In the "Law of Property (3)," Lord *St. Leonards* points out that case as one of difficulty, but one that lays down a clear and simple rule which he hopes will be followed.] There the differences between the two instruments were small; here they are very considerable; Lord *John* has an interest in the sum under the settlement; he has none in that given by the will, nay, he is expressly excluded from such an interest. It cannot, therefore, be said that the sum in the will is a satisfaction of the sum in the settlement, for the nature of the two sums and their destination are entirely different. Then comes the case of *Lady Thynne* v. *The Earl of Glengall* (4), where there was first a settlement and then a will, but there the trusts of both were nearly alike, and on that account, and because it was treated as a case of election, the one was held a satisfaction of the other. It is quite the reverse here.

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(1) 2 Russ. & My. 251, 267.

(2) 3 Macq. Sc. Ap. 203.

(3) 7 Ves. 508, 515.

These cases, and the principles that ought to apply to such a matter, were all considered in *McCarogher* v. *Whieldon* (5), where, as in this case, the father, on the marriage of his son, covenanted by will, or otherwise, to give or assure a certain sum, and a subsequent gift in his will was held not to be a satisfaction of the covenant. There the trusts of the settlement and of the will were somewhat complicated, but there, as here, the debts were directed to be paid, and one of the two parties to the marriage took no benefit under the will, but did take a benefit under the settlement. These circumstances were reasons much relied on to shew that one was not a satisfaction of the other. In *Hall* v. *Hill* (6) a father gave a bond to his intended son-in-law, conditioned for the payment of £800, and afterwards bequeathed to his daughter a legacy to the same amount, and Lord Chancellor *Sugden* held that the legacy was no satisfaction of the bond. [LORD ROMILLY:—There the obligee and the legatee were different persons.] In *Bellasis* v. *Uthwatt* (1) a sum of money, the subject of a settlement, was held not to be satisfied by a sum of money given in a subsequent will; and Lord *Hardwicke* there distinctly declared (2), that "in respect to the doctrine of satisfaction where a bequest is taken to be by way of satisfaction for money before due, the thing given by way of satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given." Here the things given were not the same in amount or in limitation, and both on principle and authority the Appellants are entitled to have the debt paid first and then the residue divided afterwards.

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(1) 1 Ball. & B. 298.
(2) 3 Cl. & F. 146.
(3) Page 129.
(4) 2 H. L. C. 131.
(5) Law Rep. 3 Eq. 236.
(6) 1 Dr. & War. 94.

Assuming that the intention of the settlor is to be considered in determining the effect of this will, then it is clear that his intention was to make a marked difference between the two instruments. The trusts of the settlement could not be satisfied by carrying into effect those of the will, nor the trusts of the will by carrying into effect those of the settlement. The two instruments must be treated as wholly independent of each other. All the cases relied on by the other side are cases of ademption, not of satisfaction, and they do not apply to a case where the settlement is the first instrument executed, where it creates an absolute debt, and where the subsequent will begins with a positive direction to pay debts, and then gives a sum of money in such a manner that its application in that manner could not possibly be a satisfaction of the settlement.

Mr. *Bacon*, Q.C., and Mr. *Giffard*, Q.C., for the Respondents:—

The presumption of the law is against double portions, and nothing can rebut that presumption except the plainly expressed intention of the donor: *Hinchcliffe* v. *Hinchcliffe* (3). [THE LORD CHANCELLOR referred to *Ex parte Pye* (4).] That case depended upon peculiar circumstances, and *Hinchcliffe* v. *Hinchcliffe*

(1) 1 Atk. 426.
(2) Ibid. 428.
(3) 3 Ves. 516.
(4) 18 Ves. 140.

was not referred to. Here there is no such plainly expressed intention, either in words or in fact, and all the circumstances of the case are opposed to the existence of any such intention. The case of *Kippen* v. *Darley* (1) is not applicable, for no presumption of satisfaction exists in the Scotch law. It does exist here, and is only to be rebutted by plain evidence. There is no evidence here to satisfy that requirement. The cases shew that under such circumstances as exist here, the presumption against double portions applies. In *Blois* v. *Blois* (2), a father had a son and two daughters by a first marriage: on his second marriage he settled lands on trust for his wife for life, and after her decease (if he should only have a daughter), to raise £3000 for that daughter. By his will he directed that when his son by a convenient match shall have raised £9000 for his three daughters, they should let the son have the estate. The Court held that the daughter of the second marriage was to have but one sum of £3000. It was thought clear there that the testator had not intended a special benefit to his youngest daughter at the expense of his son and heir. So here the testator had but two daughters. He meant to give them equal benefits; the trusts of his will shew that such was his intention, and the doctrine of presumption, therefore, applies in this case with double force. A portion given by a father to his daughter, however secured, though technically a debt in virtue of the form of the security, is not a debt in all senses of the word, and is not so for a purpose like the present. A provision for a wife was expressly held by Lord *Hardwicke* not to constitute a debt: *Lee* v. *Cox* (3). And as to the direction in the will to pay debts, the more the sum secured by the covenant bears the character of a debt, the less becomes the importance of that direction, for the law would have required the testator's debts to be paid before any residue could arise. Here no covenant was broken, and no action could have been maintained, for the covenant was to pay on demand, or to secure by will, and this latter undertaking has been fully performed. The introduction of the word "debt" cannot make any difference in the consideration of what was the testator's intention in this case. Here was a portion given to the

(1) 3 Macq. Sc. Ap. 203.
(2) 2 Ventr. 347.
(3) 3 Atk. 419.

daughter, and the question is, whether, at the cost of inflicting an injustice on the other daughter, who, by the very terms of his will, is provided for in the same manner as her sister, the testator meant to give the former a double portion. The two cases that are of importance here are those of *The Earl of Durham* v. *Wharton* (1), and of *Lady Thynne* v. *The Earl of Glengall* (2). The former of these cases effectually disposes of the argument that a difference in the amount of the sum of money of the trusts declared rebuts the presumption of satisfaction. Lord *Lyndhurst* there says (3): "It is not necessary, in order to raise the question of ademption that the sums should exactly correspond. . . . It has been argued that the limitations under the will are widely different from the limitations under the settlement, and that such difference would prevent the principle of ademption from being applicable to this case: I apprehend that this will not prevent the application of the principle of ademption, and that the authorities are all the other way." And he refers to several cases in support of his opinion. [Lord Romilly:—In a case of ademption no election can arise; in a case of satisfaction it may.] *Lady Thynne* v. *The Earl of Glengall* (2) was a case of satisfaction, and there the residue given by the will was held to be in satisfaction of the sum of stock secured by the bond. In *Platt* v. *Platt* (4) a testator made his will, leaving a sum of £10,000 to his daughter for life, but if she should marry, £5000 were to be paid to her husband, and she was to have the interest of the other £5000 to her separate use for life, and after her death without children, it was to sink into the residue for the benefit of the testator's two sons. She married in her father's lifetime, and the £10,000 were then settled in trust for her separate use for life, then to her husband for life, and after the death of the survivor, for the children of the marriage as he and she should jointly appoint, in default of appointment for the issue of the marriage, on failure of such issue, for the issue of the testator living at the death of the survivor of husband and wife. This was held a satisfaction of the legacy, notwithstanding any difference in the limitations of the trust. In *Powys* v. *Mansfield* (5), Lord *Cottenham*, in the course of a very elaborate judgment, said: "After the decision of the House of Lords in *Wharton* v. *Lord Durham*, the variation in the trusts cannot be relied upon. That case having been argued before I had the honour of a seat in the House of Lords, I abstained from taking any part in the judgment, and I was glad to be enabled to do so, because I had been counsel in the cause; but I fully concur in that judgment." In *Papillon* v. *Papillon* (1), estates on *A.*'s marriage were settled on *A.* for life, and a term was created to raise £5000 for portions for daughters and younger sons, and, subject thereto, to *A.* in fee, provided that if *A.* by writing during his life, or by will, should give to any of his children, entitled under the trusts of the term, any sum of money for advancement in marriage, or otherwise, the sum should be taken in part or in full satisfaction (according to its amount) of the portion thereby provided for that child, unless *A.* should by writing under his hand declare to the contrary. *A.* had eight daughters and two younger sons, and by his will, which recited the settlement, he devised his estates, subject to the £5000, to trustees in trust by sale or mortgage to raise money for payment of his debts and legacies, and, in the next place, to pay £2000 to each of his younger sons, and he declared that, after payment of his debts and legacies, and the sum of £2000 to each of his younger sons, the estates unsold (subject to any mortgage made in pursuance of the power) should go to his eldest son. Here was a case in which the argument was strongly pressed that the form of the will, giving this benefit to the younger sons, must be treated as shewing that the sums of £2000 given were not meant to be in satisfaction of their share of the portions; but the Court held that there was nothing equivalent to a declaration that the legacies of £2000 should not be a satisfaction for these portions, and the younger sons were therefore held not entitled to their legacies, and also to their shares of the £5000. The Vice-Chancellor said that in his opinion the portions were discharged by the payment of those legacies, and that it was incumbent on those who contended that they were not, to shew that the testator had done something which was equivalent to making the required declaration. The decision was not at all affected by the existence of a direction to pay debts. It is a settled rule of law that a child provided for by the settlement shall not take a double portion through the operation of a gift in a will, unless there is a clear intention manifested that he should do so. There is nothing of that kind here.

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(1) 3 Cl. & F. 146.
(2) 2 H. L. C. 131.
(3) 3 Cl. & F. 154.
(4) 3 Sim. 503.
(5) 3 My. & Cr. 359, 374.

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(1) 11 Sim. 642.

There is not in principle any difference between satisfaction and ademption, nor between cases where the will stands first and the settlement comes afterwards, or the settlement is first and the will comes after it. The two terms are merely different expressions of the same thing. Here were two portions, and unless there was a clear intention to create double portions, the presumption of law is against them, and they cannot be allowed.

The *Attorney-General*, in reply:—

This is a debt, though one of a peculiar nature. A specialty debt is a debt, though it is constituted in a way different from a common debt, and is to be recovered in a different form. The testator here directs payment of his debts, which must mean of all his debts, of whatever form or nature. *Lee* v. *Cox* (1) is not an authority for the other side; nor is *Blandy* v. *Widmore* (2), where it was held that there was satisfaction, because the money which would be obtained under the intestacy was greater than that which was covenanted to be given by a will. There is a difference between the case of a will and a settlement. The former is a revocable instrument; the latter is not. The will is made in doubt as to what may happen; the settlement is made with a full knowledge of circumstances. In the latter, therefore, the gift is absolute. *Papillon* v. *Papillon* (3) is really in favour of the Appellants, for there the settlement was made on the marriage of the father, and not of the child, and it was expressly declared that any gift was to be taken as in satisfaction of the portions, unless declared in writing not to be so; and, there being no such declaration, they were held to be satisfied. This is a case of satisfaction, not of ademption. There is a clear difference between them, and unless the principle, so clearly stated by Sir *John Leach* in *Weall* v. *Rice* (4) is overruled, this decree must be reversed.

(1) 3 Atk. 419.
(2) 1 P. Wms. 324.
(3) 11 Sim. 642.
(4) 2 Russ. & My. 251, 267.

1867

LORD CHICHESTER *v.* COVENTRY.

May 14. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, the question in this case is, whether a covenant by Mr. *Henry Bevan*, in the settlement made on the marriage of his daughter with Lord *John Chichester*, to pay to the trustees of the settlement a sum of £10,000 for the benefit of his daughter, and of her intended husband and the children of the marriage, is satisfied by a gift in the covenantor's will of a moiety of his residuary estate upon trust for the benefit of his daughter and her appointees, to the exclusion of the husband.

[His Lordship stated the facts of the case.]

The Vice-Chancellor held that the gift in the will of a moiety of the residue to Lady *John Chichester* was a satisfaction of Mr. *Bevan's* covenant in the settlement as to the £10,000, and that a deduction must be made to that amount from Lady *John's* moiety to provide for the covenant.

Upon appeal from this decree, Lord Justice *Knight Bruce* agreed with the Vice-Chancellor, "altogether" (as he expressed it) "under the stress of a series of decided cases, from which he held that they would not be warranted in departing." Lord Justice *Turner* was of a different opinion.

The question whether a gift in a will is to be considered as a satisfaction of a portion given by settlement, or a portion given by settlement is to be taken as an ademption of a gift by will, is one of intention. It is certainly easier to arrive at a conclusion as to that intention where the will precedes the settlement, than where the settlement is first and the will follows. In the case where the revocable instrument is first, and a portion is given by it, if the event of marriage, or any other occasion for advancing a child, should afterwards occur, it may very reasonably be supposed that the parent has anticipated the benefit provided by the will, and has intended to substitute for it the new provision, either entirely, or *pro tanto*. But where an irrevocable settlement is followed by a will, it is not so easy to infer that an additional benefit was not intended by the testator, except where he expressly declares his intention to be otherwise, or where the gift in the will and the portion in the settlement so closely resemble one another as to lead to a reasonable intendment that the one was meant to be substituted for the other.

In determining in any particular case whether a gift by a parent, or a person *in loco parentis*, is intended to be an addition to, or in substitution for, a prior gift by the same person, it must always be borne in mind that there is a presumption, or, as Lord *Eldon* expressed it in *Ex parte Pye* (1), "a sort of feeling upon what is called a leaning against double portions." "This presumption" (as Sir *John Leach* said in *Weall* v. *Rice* (2)) "may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision." According to the opinion of this learned Judge, previous decisions afford but slight assistance in these cases; for he adds, "It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as in the opinion of the Judge leave the two provisions substantially of the same nature, and every Judge must decide that question for himself."

The Vice-Chancellor, in his judgment, adverting to the cases of *Lord Durham* v. *Wharton* (3), and *Lady Edward Thynne* v. *Lord Glengall* (4), expressed an opinion that the differences between the gifts in this case were not so considerable as in those two cases, on which the decisions were against double portions.

I cannot agree with His Honour in this opinion. In both of these cases the intention that the provisions should not be double appear to me to have been strongly indicated. In *Lord Durham* v. *Wharton*, the uncle of Miss *Lambton* bequeathed a sum of £5000 charged upon his real estates, and her father, General *Lambton*, bequeathed a sum of £10,000 in trust for her for life, and after her decease in trust for her children. Upon Miss *Lambton's* marriage with Mr. *Wharton*, General *Lambton* agreed to give a sum of £15,000 to her intended husband, expressly as the marriage portion of his daughter, and in consideration thereof he was to secure to her during their joint lives the annual sum of £500 for pin money, and also a jointure of £1200 a year, and portions for the daughters and younger sons of the marriage; and it was expressly declared that the portion, or sum of £15,000, was to be in full satisfaction and discharge of all sums of money to which Miss *Lambton* was entitled under her uncle's will. This clause, upon which reliance was placed in favour of the intention not to adeem the £10,000 given by the father's will, seems to me to lead to a contrary conclusion. No reason can be suggested for any distinction between the sums given by the uncle's and by the father's wills. But it must have been known that, without an express declaration to that effect, £5000 of the £15,000 given by the settlement could not have been held to be a satisfaction of the legacy in the uncle's will; whereas it might very well be supposed that the remaining £10,000 would be understood to be an advancement in anticipation of the provision contained in the father's will. The difference in the provisions made for the children by the will and by the settlement was therefore held not to prevent the application of the principle of ademption, however much that circumstance might affect a question of satisfaction by will of a portion given by a prior settlement.

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(1) 18 Ves. 140.
(2) 2 Russ. & My. 267.
(3) 3 Cl. & F. 146.
(4) 2 H. L. C. 131.

The case of *Lady Edward Thynne* v. *Lord Glengall* was one of the latter description. In that case Mr. *Mellish*, on the marriage of his daughter with Lord *Edward Thynne*, having agreed to give her a portion of £100,000, transferred part of that sum to the trustees of the marriage settlement, and gave them a bond for the transfer of the remainder at his death, the amount secured by the bond to be held by the trustees in trust for the daughter's separate use for life, and after her death for the children of the marriage, as she and her husband should appoint. Mr. *Mellish* afterwards, by his will, gave to two of the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally, as she should appoint. It was held, first, by Lord *Langdale*, Master of the Rolls, and afterwards by this House, that the moiety of the residue given by the will was a satisfaction of the sum of money secured by the bond. It is quite clear that the bond given to the trustees in this case was treated as part of the daughter's portion, as distinguished from a debt. If it had been regarded as a debt the decision must have been otherwise, "for" (as was said by the Lord Chancellor) "it has been decided that, in the case of a debt, a gift of the whole or part of the residue cannot be considered as a satisfaction, because, it is said, the amount being uncertain it may prove to be less than the debt."

It thus appears that the two cases of *Lord Durham* v. *Wharton*, and *Lady E. Thynne* v. *Lord Glengall*, are altogether different from the present case. Here, admitting that the £10,000 agreed to be given by Mr. *Bevan* on the marriage of his daughter was in the nature of a portion, it was provided for by means of a covenant entered into with the trustees of a settlement to pay them the amount within three months after demand in writing, with interest in the meantime until payment. There can be no doubt that this constituted a debt to the trustees, and that after demand they might have maintained an action of debt as well as covenant for the principal and interest against Mr. *Bevan*, or against his executors. If it is to be regarded as a debt, then, according to what was said by the Lord Chancellor in *Lady Edward Thynne* v. *Lord Glengall*, the gift of the moiety of the residue to Lady *John Chichester* by her father's will cannot be considered as a satisfaction. Viewing it in this light, there is this additional circumstance in the case, that there is a provision in Mr. *Bevan's* will for the payment of his debts (the £10,000 being the only debt known to exist); and, therefore, the residue, which is assumed to be given in satisfaction of the covenant, cannot be ascertained till provision is first made for it out of his estate.

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Judging of the intention of the testator from the dispositions in his will, I collect that he meant to make his daughters as equal as possible in respect of everything which he possessed at the time of his death. The gift of a house to each of them, the division of his pictures, the bequest of his jewels, wines, carriages, and horses, &c., in equal shares and proportions, all indicate this to have been the ruling idea in his mind; and so, when he comes to deal with the residue, he does not divide it into moieties, and direct that the interest of each separate moiety shall be paid to the daughters respectively, but he gives the whole of the residue, after payment of debts and legacies, to the trustees (with power for the daughters to direct in what stocks, funds, and securities it shall be invested), in trust to pay a moiety of the income of the entire residue to each of the daughters.

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I certainly find great difficulty in discovering in the dispositions of this will any opening for the satisfaction of Mr. *Bevan's* covenant out of Lady *John Chichester's* moiety of the residue.

The differences between the limitations of the £10,000 in the settlement and the will appear to me to be so marked as to be sufficient to overcome any presumption against a double provision. By the settlement, the £10,000 are given to the trustees, in trust to pay £200 per annum to Lady *John Chichester*, for pin money, and the remainder of the interest to her husband, and, if she survive him, to her for life, and, after the death of the survivor, to the children of the marriage, as she shall appoint. By the will, the moiety of the residue is given to her for her separate use for life, with a general power of appointment afterwards, to the exclusion of her husband, and no mention is made of children.

The decree appealed from appears to me to be at variance with the intentions of the testator, as indicated by the whole of his will. He directs that his debts shall be paid, and then that the residue shall be divided between his daughters. The decree makes the £10,000 to be deducted out of the moiety of the residue after it has been ascertained. Instead of the trustees under the will providing for the satisfaction of the covenant from the testator's personal estate, Lady *John Chichester* is made to perform it out of her moiety of the residue, the income of which is bequeathed to her and her sister in equal moieties. If the £10,000 are to be paid out of Lady *John Chichester's* moiety, the income of a moiety of the residue will not be payable to her, which will be contrary to the express words of the will.

I am, therefore, of opinion, that the decree appealed from ought to be reversed.

LORD CRANWORTH:—

My Lords, neither party in the argument of this case disputed the rule acted on in Courts of equity, that there is a presumption against double portions. I have more than once had occasion to express my opinion that this is a useful rule, carrying generally into effect the intention of parents and others making provision for those for whom they are bound to provide. It is, however, but a presumption, and is therefore liable to be met by counter presumptions, shewing that in any particular case it ought not to prevail.

It is a rule much easier of application when the first provision is made by will and the second by deed, than where, as in this case, the first provision is by settlement, and the will follows. In the former case the provision by will is under the absolute control of the person making it up to the time of his death; and when, therefore, after the date of the will, he makes a settlement for the benefit of the person provided for by the will, the only question is, whether he intends the latter to supersede the former provision. If that is his intention, he has unlimited power to carry it into effect; he is under no obligation to obtain the consent of the person for whom he intended to provide by his will. But where a parent provides for a daughter by settlement on her marriage, binding himself to secure at his death a stipulated sum for the benefit either of her absolutely, or of her and her husband and their issue, and afterwards makes provision for her or them by his will, it is obvious that without the consent of those entitled under the settlement he cannot substitute the benefits he may have chosen to confer by his will for those which he had already secured by deed. In such a case he can only make the testamentary gift a substitute for what he was by deed bound to provide, in case those entitled under the settlement see fit so to accept it. The application of the rule is thus made more difficult; still there is no doubt that the rule itself is held to be applicable in the latter as well as in the former case.

16 Eq. 599
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But the rule, as I have already noticed, is but a rule of presumption, and there is much less difficulty in supposing that it was not intended to prevail where the person to whose dispositions it is to be applied, had not the power to enforce it without the consent of others, than in a case where the whole was under his absolute control. When the will precedes the settlement it is only necessary to read the settlement as if the person making the provision had said, "I mean this to be in lieu of what I have given by my will." But if the settlement precedes the will, the testator must be understood as saying, "I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it." It requires much less to rebut the latter than the former presumption. Add to which, the necessity for making such a declaration in express terms would be much more obvious to a testator making a will whereby he desired to affect rights already acquired, than to a settlor making an absolute provision by deed for one who had acquired no previous rights whatever.

It has been very truly said, that no positive rule has been or can be laid down as to what is sufficient to rebut the *primâ facie* presumption against double portions. That is a matter which, from the nature of things, must be left, in each particular case, to the judgment of the tribunal which has to decide it. But one great question always has been, whether that which is given by the latter is given to be enjoyed in the same, or nearly the same, manner as that which is given by the former instrument. When a parent has by his will given a portion to his daughter absolutely, and has, by a settlement on her marriage, after the date of his will, secured a sum of like amount for the benefit of her and of her husband and issue, the mere circumstance that she would have taken, under the will, an absolute interest, whereas under the deed she takes only a life interest, raises no difficulty. The parent may reasonably suppose the two gifts to be the same. If the daughter had received the sum under the will, she would probably have settled it in the way in which, by the hypothesis, it was settled in her parent's lifetime. It would not occur to the parent to think that the interest taken by her was substantially different in the one case and in the other. But there must be some limit in such cases, and more especially where, as in the case now before the House, the settlement precedes the will; and, looking to the two instruments now before us, I have come to the same conclusion as my noble and learned friend on the woolsack—namely, that the differences between the gift by the will and the benefits secured by the covenant are so great as to prevent the application of the general rule.

In the first place, what is here given is a moiety of the residue of the testator's real and personal estate, after payment of debts and legacies. I do not doubt that a share of residue may be treated as a portion within the rule against double portions; but the residue cannot be ascertained till after the debts are paid. Here the testator was a man of great wealth, and does not seem to have had any debt except that arising on the covenant on his daughter's marriage. It is natural to suppose that if he meant the residue to be ascertained, as if no such covenant had been entered into, he would have adverted to that in his will. He would have naturally expressed what we are called on to presume: that the share of residue given to his daughter, *Caroline Mary*, was to be accepted by her in lieu of what she was entitled to under his covenant.

But even if that difficulty could be overcome, the enjoyment of the residue was to be in a mode so entirely different from that secured by the covenant as to exclude, without express declaration, the notion that the one could have been intended as a substitute for the other. Under the covenant Lord *John* has a life interest in the £10,000, subject to his wife's pin money; he has no interest whatever in the residue under the will. Under the covenant the children of the marriage, if there had been any, would have been entitled. There is no mention of children in the will. In default of children, Lady *John*, if she should die in her husband's lifetime, has, by the covenant, an absolute power of appointment by will over the £10,000; but by the testator's will she is precluded from giving anything to her husband. There are other minor differences; but those which I have pointed out are sufficient to shew, not only that the limitations in the two instruments are substantially different, but that the testator was anxious to make them so.

Now, the rule of the Court on which the Respondents rely is founded on the assumption that, in making the second instrument, the maker of it supposes himself to be substantially satisfying the obligations of the first. It is impossible to put such a construction on this will. No doubt it was open to Mr. *Bevan* to impose on his daughter, by express terms, the duty of accepting the moiety of the residue, guarded as it is with respect to her disposal of it, in full satisfaction of her claims under the settlement; but he has not done this, and I can see no reason for presuming any such intention which has not been expressed.

I am therefore of opinion that the decree ought to be reversed, and the case sent back to the Court of Chancery, with a declaration that the gift of the moiety of the residue was not intended to be in substitution of the rights acquired under the covenant.

LORD ROMILLY:—

My Lords, I concur in thinking this judgment ought to be reversed.

It is to be remembered that this is a case of satisfaction, and not of ademption. I think that a full view of the cases, and a consideration of the doctrine on this subject, do not justify the observation that there exists no distinction between ademption and satisfaction, an observation which is not, so far as I have been able to examine the cases, to be found in any other case on the subject, and which, if adopted, would often entangle the Court in this difficulty, that it would be hard to discover how any question of election could ever arise; and accordingly the Vice-Chancellor in this case below expressed himself as unable to understand how election was or could be dealt with in the case of *Lady Thynne* v. *The Earl of Glengall* (1). I venture to think that the distinction is marked, and that it is recognised in all the decided cases on the subject. It appears to me to be accurately expressed by the legal terms, *ademption* and *satisfaction*. The general question was, I think, well expressed by Lord *Cranworth* during the argument, when he said, that in cases where it arises the second instrument must be read as if the maker of that instrument had expressed in it that he intended the benefit thereby given to be taken in substitution for the benefit given by the former instrument. In truth, in both cases, the second gift is given in substitution for the former benefit.

The distinction between ademption and satisfaction lies in this: in ademption the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word *ademption*, because the bequest or devise contained in the will is thereby *adeemed*, that is, taken out of the

(1) 2 H. L. C. 131.

will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenants the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore this distinction is manifest. In cases of satisfaction the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, and the persons intended to be benefited by the bequest or devise, in other words, the objects of the bequest, must be the same. In cases of ademption they may be, and frequently are, different.

The cases of *Lord Durham* v. *Wharton* (1), and of *Lady Thynne* v. *Lord Glengall* (2), afford striking and leading instances of each of these two cases.

Lord Durham v. *Wharton* was a case of ademption. In that case *William Lambton* bequeathed £5000 to his niece *Susan*, who was the daughter of General *Lambton*. General *Lambton*, by his will, gave his daughter *Susan*, in addition to the £5000 she took from her uncle, £10,000 to her for life, and after her death in trust for all her children. The will was made in 1788. In 1790 the daughter *Susan* married Mr. *Wharton*. General *Lambton* advanced £15,000 on that marriage to Mr. *Wharton*, and declared that it should be in satisfaction of the legacy of £5000 from the uncle. And in consideration of the marriage, and in consideration of this sum paid to him, Mr. *Wharton* settled £500 per annum pin money on Mrs. *Wharton*, a jointure of £1,200 per annum if she survived him, and also £30,000 for the younger children of the marriage. This was held, in accordance, I must say, with the principles of all the previous cases, to be an ademption of the legacy of £10,000. I think that no question could well have been raised upon it if it had not been that the £15,000 are stated in the settlement to be in satisfaction of the legacy of £5000 from the uncle. It was strongly urged, that upon the principle of *expressio unius est exclusio alterius*, this was an implied statement that the legacy of £10,000 was still to subsist. The answer, and, I think, the conclusive answer, was, that the presumption of law did that which, in the case of the uncle's legacy, required an express statement to effect.

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(1) 3 Cl. & F. 146.

(2) 2 H. L. C. 131.

In that case the children of the daughter were in both cases provided for, but the rule would have been the same if the first gift, viz., the legacy, had been to the daughter absolutely, because the law very properly, and in accordance with the ordinary usage of mankind, considers that on the marriage of a child the settlement for that child and the children of the marriage is a settlement for the benefit of the child of the settlor. The consequence is, that, in all cases of ademption, a bequest of a sum of money to a child absolutely, is adeemed by the settlement of that or a larger amount on the marriage of that child; if a smaller amount it is an ademption *pro tanto*.

But in cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied *pro tanto*, that is, so far as the child is concerned. So also if the bequest be to the children of the marriage, omitting the parent, that may be a satisfaction of so much of the covenant as relates to them, but it is no satisfaction of the covenant to the parent.

Accordingly in these cases if the bequest be to the parent the parent may elect, or if the bequest be to the children of the marriage alone the children may elect to take under the will instead of taking under the covenant; but this cannot affect the rights of the other covenantees who take no interest under the will.

This appears to me to be shewn very clearly in the very important and valuable decision of *Lady Thynne* v. *Earl of Glengall* (1). There the father, on the marriage of Lady *Glengall*, gave £100,000 to her for life for her separate use, and after her death *to the children of the marriage as she and her* husband should appoint. By his will the testator gave half the residue of his estate to Lady *Glengall* for life for her separate use, and after her decease for *all* her children, whether by the present or any future marriage, as she *alone* should appoint.

(1) 2 H. L. C. 131.

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Here it is to be observed that the daughter, Lady *Glengall*, and the children of the first marriage, are objects of both gifts; they are both covenantees and legatees, the only difference between the objects is, that the children of a later marriage are let in. This, as the House of Lords, confirming the decision of the Master of the Rolls, held, is clearly a case for election. Lady *Glengall* and the children of the first marriage, if adult, would have elected separately to take either under the covenant or under the will; and if the children of the first marriage had elected to take under the settlement, their share of the residue after the determination of the life interest of Lady *Glengall* must have gone on the principle of compensation; which, and not forfeiture, has long been settled to be the principle of election to make good to the children of the subsequent marriage what had been taken from them. As there were no children of the first marriage, which marriage was still subsisting, the Court, as it usually does in such cases, elected for the children that might be born; and finding that the residue was much larger than the amount secured by the covenant, thought it most for their benefit, as it clearly was most for Lady *Glengall's* benefit, to take under the will. This is correct and perfectly intelligible. But if the decree in that case had been made in conformity with the decree in the case before us, it would have given the residue to the residuary legatee upon condition that the covenant made on the settlement was paid out of her share of the residue, which is, I apprehend, at variance with principle and authority.

This will, in my opinion, be made distinct by pointing out how the two different modes of decree would have operated in the respective cases. Supposing there to have been children of a second marriage—£100,000 settled on Lady *Glengall* for life to her separate use, remainder to the children of first marriage—a residue worth £200,000 by will given to Lady *Glengall* for life for her separate use, remainder to children of both first and second marriages. Supposing one child by the first marriage, and two children by the second marriage, to be alive at the death of the testator, then, according to the decree of the Court below in this case, £100,000 are to be deducted out of this residue, which sum is to be paid to the trustees of the settlement in trust for Lady

Glengall for life, remainder absolutely to the single child of the first marriage, and the remaining £100,000 of the residue is to go to Lady *Glengall* for life, remainder equally between all her three children. But this is not what the testator has said, or what he intended. By the presumption of law he is supposed to have intended that the provision made by the will should be a *substitution* for, or, in other words, an extinguishment of, the covenant.

And that is worked out in this manner by election. The child of the first marriage is bound to elect. He is told that he must either let in the children of the second marriage to share with him in the covenant, or that he must give up his share in the residue after the decease of Lady *Glengall*, and that what he gives up will go to compensate the children of the second marriage for what they lose by his insisting on the due performance of the covenant. Accordingly, in the case I have suggested, if the principle of the decree before us be applied, the child of the first marriage gets on the death of his mother £133,333, and each child of the second marriage £33,333 only; whereas, on the principle of election, the child of the first marriage, if he elect to take under the settlement, gets £100,000 on the death of his mother, and the two children of the second marriage get £50,000 each, or, in other words, the child of the first marriage must give up his share of the residue to compensate the others for what he has taken away.

This appears to me to be the defect in the decree, which actually directs the £10,000 to be paid to the trustees of the settlement, which arises from want of bearing distinctly in mind the correctness of this proposition,—that the distinction between ademption and satisfaction lies in this, that in cases of satisfaction a case of election must always arise, and in cases of ademption never.

In truth, the decree of the Court below does not substitute the gift of the residue for the covenant, but gives the residue to the legatee upon condition that he performs the covenant; it does not satisfy the covenant, but it performs the covenant.

I think that these two cases before this House, and the case of *Hall* v. *Hill* (1), before Lord Chancellor *Sugden*, who laid down that a legacy to the daughter was no satisfaction of a bond

(1) 1 Dr. & War. 94.

to the husband on the marriage of that daughter, which are all most valuable decisions, very clearly lay down the law on this subject.

I think that the principle to be borne constantly in mind is, that the provision by the will is to be a substitution for the provision by the settlement, and that the provision by the will can never be treated as a bequest upon an implied condition that the legatee performs the covenant. The covenant, if at all, must be performed by the testator, or by his legal personal representative out of his estate. The testator, by his will, gives something in lieu of the covenant; if that is accepted, the covenant is superseded, and is not to be performed at all.

I have looked through all the cases I can find, and I do not find one in which a provision by will to one person, or one set of persons, has ever been held to be a satisfaction of a covenant in favour of another person, or another set of persons. That result could only be got at by converting the provision given by the will into a legacy, coupled with a condition not expressed by the testator. The definition of satisfaction given, or rather adopted, by *White* and *Tudor* in their Leading Cases in Equity (1), seems to me to express this accurately, namely, "Satisfaction is the donation of a thing with the intention that it is to be taken either wholly or in part in *extinguishment* of some prior claim of the *donee*."

I am of opinion that as a covenant may be satisfied *pro tanto*, as is laid down in *Kirk* v. *Eddowes* (2), and several other cases, so also the converse of that proposition is true, namely, that a provision by will may satisfy one part of the covenant without satisfying the other parts of it; for instance, that if a father, on the marriage of his daughter, should settle £10,000 on her for life, remainder to the children of the marriage, a bequest of £10,000 to that daughter would satisfy her life interest in the £10,000, but would not satisfy or touch the interests of her children.

Hitherto I have treated the case as one where the father has, in the second instrument, stated that he intended the provision thereby made to be in substitution for the former provision made by him. But in considering the present case a new question arises, which is, whether the difference between the two provisions is not sufficient to rebut the presumption of law against double portions.

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(1) 3rd Ed. vol. ii. p. 349, n. to *Chancey's Case*.

(2) 3 Hare, 509.

By the settlement £10,000 is given to trustees in trust to pay £200 per annum as pin money to Lady *John Chichester*, the rest of the interest is to go to her husband, and if she survive him, to her for life, and after the death of the survivor to the children of the marriage, as she shall appoint. By the will, he gives her half of the residue for her separate use for life, with a general power of appointment after her decease, excluding her husband. I think that this is such a difference as, when coupled with the direction to pay his debts, rebuts the presumption respecting double portions. In the first place, the testator directs his debts to be paid; this would include the covenant. In *Chancey's Case* (1), which was satisfaction of a debt by a legacy, much stress was laid on the fact that the testator directed that all his *debts* and *legacies* should be paid. The decree as it now stands gives the half of the residue to Lady *John*, coupled with a condition that she shall pay this debt, or, rather, it directs £10,000 to be paid out first to the trustees of the settlement; therefore, contrary to the direction of the testator, the residue is to be ascertained before this debt is paid. In the second place, it does not appear to me that a residue, however large, can be presumed to be intended to be given in satisfaction of pin money or of a reversionary life interest, whether they are taken jointly or separately. I cannot, however, say that the cases are very clear on that subject.

It has been decided in *Bellasis* v. *Uthwatt* (2) and in *Hanbury* v. *Hanbury* (3) that a contingent legacy is no satisfaction of a vested portion, and also that the different nature of the property left will rebut this presumption of law. Thus, a devise of land is no satisfaction of a covenant to pay money, and *vice versâ* (see *Bellasis* v. *Uthwatt* (2), and many other cases), unless the testator estimates the value of the land at a fixed sum, and desires it to be made up to a particular amount, as in *Bengough* v. *Walker* (4), before Sir *W. Grant*. So in *Holmes* v. *Holmes* (5), a legacy of

(1) 1 P. Wms. 409.
(2) 1 Atk. 426.
(3) 2 Bro. Ch. C. 352.
(4) 15 Ves. 507.
(5) 1 Bro. Ch. C. 555; 1 Cox, 39.

£500 to a son was not adeemed by the father giving the son his stock in trade, which was of much greater value.

My opinion is, that the gift of half the residue in this case cannot be taken as any satisfaction of the covenant in favour of the husband and the children of the marriage, and that, having regard to the very different nature of the two provisions, the bequest of the residue was not intended to affect Lady *John's* interest under the covenant. To use the words of Sir *John Leach* in *Weall* v. *Rice* (1), "It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature; and every Judge must decide that question for himself."

In my opinion the provisions of the will and of the covenant are substantially different, and no case of satisfaction arises, and consequently the judgment of the Court below must be reversed.

LORD COLONSAY:—

My Lords, after the very full opinions that have now been delivered, it is unnecessary that I should add almost anything, concurring as I do in the result at which your Lordships have arrived. The aspect in which the case has presented itself to my mind is this:—We are here dealing with the will of Mr. *Bevan.* We are required in so dealing with the will to discover, if we can, what was the intention of the testator. That intention may, or may not, be clearly expressed, but if it is not clearly expressed we must gather it from presumptions. Now, presumptions are not speculations—they are governed by certain rules of law which give weight to them—to some, greater weight than to others—and it is reasonable to suppose that parties who are making instruments of this kind have such presumptions more or less in their minds. The origin of these presumptions it is unnecessary to go into. They may vary in different countries. They arise from what is supposed to be the intention of a party living in a particular state of society under certain rules that have been established as to the modes of providing for the members of a family usual amongst such persons, having reference more or less to the ability of the party to provide for them.

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(1) 2 Russ. & My. 251—267.

My Lords, these and various other considerations are pressed upon our minds when we endeavour to discover the intention of the party. But I can conceive no consideration more important upon a question of double portions than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other. The presumption in *England* is very strong against double portions, but it is only a presumption. It is a presumption which is to be gathered from the circumstances of the case, and which may be rebutted by other circumstances which countervail that presumption. The general doctrine, as laid down by Sir *John Leach*, is, I think, perfectly sound. There is no difficulty at getting at the general doctrine—the difficulty is in applying it to the circumstances of each particular case. The explanation which has been given of the case of *Lord Durham* v. *Wharton* (1) is, to my mind perfectly satisfactory, and I was very glad to hear it, because it was the explanation I ventured to give of that case in a case that has been referred to in the argument in this case—I mean the case of *Kippen* v. *Darley* (2). The distinction there was very clear between the one interest and the other. It is perfectly clear in this case that the party, whom I am disposed to call the creditor of the settlement, is not the same in person, nor the same in interest, with those who are benefited by the provision under the will; and that circumstance, along with others to which your Lordships have referred, has satisfied my mind, almost from the outset of this argument, that the judgment we are now called upon to review is one which cannot be sustained.

The *Attorney-General*:—As to costs, my Lord, does your Lordship mean the costs below to stand as they stood by the decree of the Court below? The decree which your Lordships have reversed provided for the costs below both before the Vice-Chancellor and before the Lords Justices. The decree provided for the costs out of the estate. Your Lordships' decree does not affect that?

(1) 3 Cl. & F. 146.

(2) 3 Macq. Sc. Ap. 203.

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THE LORD CHANCELLOR:—Certainly not.

The *Attorney-General:*—I only wished to know your Lordship's pleasure upon that.

Mr. *Bacon:*—The costs of all parties come out of the estate.

The *Attorney-General:*—That includes the costs of the appeal also?

THE LORD CHANCELLOR:—Yes.

Judgment given for Appellants.

Lords' Journals, 14th May, 1867.

Solicitors for the Appellants: *White, Broughton, & White.*
Solicitors for the Respondents: *Nash, Field, & Layton.*

THE DIRECTORS, &c., OF THE CENTRAL RAILWAY COMPANY OF VENEZUELA } APPELLANTS;

AND

JOSEPH KISCH . . . . RESPONDENT.

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March 26, 28, 29; *April* 1: *May* 14.

Company—Prospectus—Misrepresentation—Shareholder—Practice—Appeal.

Where a person believes that he has been misled, by representations which are false or deceptive, into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay.

The same rules as to false or deceptive representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. No misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company.

The public are, in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess.

Where there has been fraudulent misrepresentation, or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry.

The phrase "available capital of the company" is not a true, but is a de-

7 Ch. 418
421.
— 607, -9, 11, -3.
4 Eq 595, -9
2 Ex 325.
2 Q.B. 581
— 6C
Port 329, 338
344, -5, 367, 374
6 Eq 501

5 Eq 120, 254 6 Eq 351, 6 H.L. 381
3 Ch 470 4 H.L. 68
7 Eq 160 7 Ch 738
23 Ch D 412 10 [illegible]
8 C.B. [illegible]
3 Ch D 772 5 Ch D [illegible]

ceptive, description of capital which may be raised under the borrowing powers conferred upon directors.

Where a prospectus described a contract for the construction of a line of railway as entered into at "a price considerably within the available capital of the company," and the facts were, that from the nominal capital of £500,000 were to be deducted £50,000 as the price of purchasing the concession to make the railway, and the contract price for making it was £420,000, the representation was held to be untrue and deceptive.

A prospectus of a railway company stated that "the engineer's report, maps, plans, &c., may be inspected, and farther information obtained at the offices of the company." An applicant for shares signed the printed form of application, in which, as usual, it was stated that he agreed to be bound by the conditions and regulations contained in the memorandum and articles of association. An examination of all of these papers would have afforded him the information, the want of which he alleged as a ground for rescinding his contract. Trusting to the representations, he did not examine all:—

Held, that his neglect to do so was no answer to his demand to be relieved from the contract.

A bill was filed to rescind a contract on the ground of there having been misrepresentations of facts. Relief was given in the Court below on only some of the alleged grounds. An appeal was brought against the decree:—

Held, that it was open to the Respondent to sustain the decree on any or all of the grounds stated in his bill.

THIS was an appeal against a decision of the Lords Justices, by which an order of Vice-Chancellor Sir *John Stuart* had been reversed.

In the year 1856 the legislature of *Venezuela*, with a view to establish railways there by the aid of foreign adventurers, passed a law authorizing the executive government to conclude contracts for the construction of certain lines of railway to be called "*The Central Railroad of Venezuela*," giving, of course, certain advantages to those who should enter into such contracts. On the 18th of January, 1857, a contract was entered into between the Secretaries for the Interior, for Justice, for the Treasury, and for Foreign Relations, of the one part, and certain persons forming a financial company, and called "concessionaries," on the other, by which the latter bound themselves to construct certain railways on the terms mentioned in the contract. The construction of the railways was at first prevented by the existence of a war, which having come to an end, the period for commencing the works was fixed for the 31st of July, 1864. One of the terms of the contract required the deposit of £20,000 as "caution money" for the commencement of the works within twelve months after that date. The original concessionaries ultimately sold the concession, such of the works as had been commenced, and the plant thereof, to the Appellants, the promoters of the present company, the *Central Railway Company of Venezuela, Limited*, for the sum of £50,000. The company formed by the Appellants was, in July, 1864, registered under the *Companies Act*, 1862, and the memorandum of association stated that the objects of the company were the constructing, maintaining, managing, and working railways in *Venezuela*, the first section of which was to be from *Puerto Cabello* to *San Felipe*, a distance of fifty-four miles, the supplying the plant, acquiring concessions from the government, &c., and the capital was stated to be £500,000 in 10,000 shares of £50 each. The prospectus issued by the Appellants set forth that, among other advantages enjoyed by the company, there was a government guarantie to the shareholders of 9 per cent. per annum, for twenty years, on the capital employed, amply secured by a mortgage of 10 per cent. on the import duties of *La Guayra* and *Puerto Cabello*, together with 2½ per cent. guaranteed by the contractor during the construction of the line, and that the interest would run from the commencement of the works. The prospectus represented that *Venezuela* possessed, perhaps, the most prolific soil in the world; that tens of thousands of acres awaited occupation; that the railway would pass through a district most productive in coffee, cocoa, cotton, hides, indigo, &c., and richly agricultural; so that "a large and permanent traffic will be at once secured to the company," and that the government of the Republic had bound itself not to grant, for a period of twenty-five years, any other concession for the construction of a railway in the direction of the *Central Railway*. The prospectus went on thus to describe the privileges secured to the company:

1. "A guarantie of 9 per cent. interest on all calls paid on account of the subscribed capital for a period of twenty years, amply secured by a cession of the import duties of *La Guayra* and *Puerto Cabello*."

4. "A free grant of all lands required for the construction of the railways, and for the stations and other buildings required to be executed."

5. "A free grant of 30,000 acres of land, in addition to the above,

in the provinces through which the railway will pass, and for which land warrants will be issued to the company on the completion of the line."

As to the contractor, the prospectus set forth: "A contract has been entered into by the company with a responsible contractor, based upon surveys, plans, and sections approved by the government, for the completion of the line from *Puerto Cabello* to *San Felipe*, including stations and rolling stock, at a price considerably within the available capital, and the works will be commenced forthwith. Security has been taken for the due fulfilment of the contract. The contractor, also, in consideration of receiving a large quantity of timber along the line for his use, guarantees 2½ per cent. on the paid up capital during the construction of the works."

The Respondent received a copy of the prospectus in the ordinary way by post. Attached to it was the common form of application for shares, containing the usual words, "I agree to be bound by all the conditions and regulations contained in the memorandum and articles of association." He paid, on the 13th of July, the sum of £100 into the bankers of the Appellants, and then signed the form of application for 100 shares, and forwarded it. The shares were allotted to him at once. With this letter of allotment, dated 14th of July, came a demand on him to pay the farther sum of £2 per share. On the 20th of July he paid that call, but before doing so called at the office of the company, had an interview with the secretary, and asked that the number of shares allotted him might be reduced to twenty. On the 25th of July the secretary wrote to say that the directors could not comply with his request, adding, "but there will be no difficulty in your disposing of them on the *Stock Exchange*." In September a farther call of £2 per share was made on the Respondent, which, however, he did not answer, and the solicitors for the Appellants applied to him on the subject by letter on the 11th of November. On the following day the Respondent's solicitor applied for permission to inspect the concessions and contracts referred to in the prospectus. This application was granted, and he and the Respondent examined these documents on the 22nd of November. The call was not paid, and on the 15th of December, 1864, the Respondent owed for unpaid calls, and for interest thereon, the sum of £707 18*s.* 2*d.*, and an action was brought against him in the Court of Common Pleas to recover the amount. The declaration was delivered on the 26th of January, 1865, and on the 28th of January the Respondent filed his bill in Chancery, in which he set forth the circumstances of his becoming a shareholder in the company, alleged untruthfulness in the representations made in the prospectus, the discovery of certain facts of which he was ignorant when he applied for shares, and that he would not have taken the shares if he had known these facts, and he prayed, therefore, that he might be released from the contract on account of the fraudulent misrepresentations of the directors, that they might be ordered to repay to him the deposit and the calls paid by him, with interest and expenses, and he offered to return them the said shares; and he farther prayed that they might be restrained from proceeding in the action.

The representations of which he especially complained were the statements as to the capital of the company, from which all mention of the £50,000 for the purchase of the concession was omitted, while the contract for the construction of the line was made for £420,000, thus leaving no more than a possible balance of £30,000 for all contingencies; the statements as to the grants of land, as to the guarantie of 9 per cent., and as to the way in which that amount of interest was secured on the imports of *Puerto Cabello* and *La Guayra.* He also insisted that there had been great and material misrepresentations as to the contractor, his duties and liabilities.

Evidence was taken on both sides, and the various documents were produced (1). The authority given by the legislature to the government of *Venezuela,* of April, 1856, was thus set forth:— "The executive power is authorized, in order that, in the name of the nation, and as far as ten years, it guarantees the interest up to 7 per cent. on the capital which, during this time, may be employed in railroads; but, in case that the roads shall not be producing any interest on account of any causes imputable to the company, the nation shall not be obliged to pay the said interest."

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(1) The documents are quoted as given in the printed papers laid before the House. The originals were not printed. The translations are very unsatisfactory, and, in some instances, hardly intelligible.

Article 17 of the contract (made in January, 1857) was in these terms:—"The executive power, in the name of the nation, guarantees, for ten years, as a minimum, the interest of 7 per cent. annually, in favour of the capital which during this time may be employed in the railroads, while these do not produce it from a cause not imputable to the company; and, it being understood that, from the time when they may produce any, the nation shall not be bound to pay in this time, except what may be wanting to complete the 7 per cent. guaranteed."

By an authoritative article of October, 1858, called "An Explanation of the last-mentioned Contract," it was declared (Article 7), "That the interest of which Article 17 speaks shall not be paid except upon the sums really and actually laid out upon the railroads . . . and, whatever may be the amount of the sum employed in them, the assistance of the government for the payment of the 7 per cent. aforesaid, shall not exceed the 10 per cent. of the import and export duties which may be collected by the Custom House of *Puerto Cabello;* that as soon as the proceeds of the *Central Railroad* exceed 7 per cent. of the sums expended upon it, the excess shall be applied to the reimbursement of that which the government may have paid in virtue of this article, unless the company decides to make the reimbursement with shares of the said undertaking." The article went on to declare the appointment, by the government, of a director, who was, even though he might have no shares in the company, to be a controller of the company, and who was to have a salary paid by the company, "and that the payment of the 7 per cent. offered by this article shall not commence but when the company has a capital of 200,000 dollars at least, beyond the privileged shares mentioned in the Article 13."

In September, 1863, the government passed some resolutions, one of which (Article 3) was as follows:—"The government agrees to guarantee, as a minimum, for the term of 20 years, interest at 9 per cent. per annum, in favour of the capitals which may enter into the coffers of the company, from the day on which the government receives the official intimation that the works of the railway have been commenced, and the amount of the sum which this interest is to gain will be verified by the representative of the government, who, for this and other purposes, will have a seat in the direction of the company at *London*. This interest is guaranteed so long as the said capital does not produce 9 per cent. for a reason not imputable to the company, and this being understood in the same terms which Article 17 of the contract of January, 1857, and its only paragraph, express. For the payment of this interest there is set apart, specially and signally, during the first year, the 5 per cent., and in the rest, the 10 per cent. of the import duties of the Custom Houses of *La Guayra* and *Puerto Cabello*."

A decree of the 28th of January, 1864, contained the following article:—"The government will guarantee as dividend on the capital employed as far as 9 per cent. per annum, while, for causes not imputable to the company, what the line may produce do not reach so much; but this guarantie shall never be for more than 20 years."

With regard to the granting of lands to the company, the Articles 3 and 7 of the decree of April, 1856, were these:—"Art. 3. For fixing in the contract the rules necessary for obtaining private property when it may be necessary for the railway line or its dependencies, there being previously the just indemnification on the part of the undertaking: the work being considered as one of public convenience. The waste lands (1), which, according to the present decree, it is agreed to give to the company, shall only be able to be taken from the provinces benefited by the railroad, and in case there be not such in these, the concession remains without effect, which cannot be a subject for claim. In the grounds ceded by the present decree, those are not included which, with any title, the Venezuelans possess at the time of the publication of this decree."

In the contract of the 18th of January, 1857, Article 4 provided that—"The executive power, making use of the authorization which the legislative decree already mentioned gives to it, grants to the Senor *Lorenzo Jose* and his associates, and their heirs and successors, the ownership of 500 fanegadas of waste lands for each mile of railway which they may construct, in addition to 30 varas of width for the line of road, throughout all its extent, and to those which may be necessary for forming the depôts or offices which the service of the railway may require: provided that the said lands are in the provinces benefited without being owned by Venezuelans at the date of this contract." "In case the lands necessary for the line of the road, its depôts and offices, are private property, the executive power shall intervene (if the company and the owner do not arrange between themselves) to cause them to be ceded to the company, the just indemnification having previously been made by the latter for their actual value, determined by skilled persons to be named by the company and the proprietor, one by each party, and an umpire whom the government shall name, without their entering into the estimate the greater value which the railway itself will give them."

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(1) There was much discussion about the meaning of this expression—the Respondent insisted that it meant waste lands, the Appellants that it meant unoccupied or unappropriated lands.

Art. 5. "Each time the company presents constructed a part of the railway which can be made use of by the public, there shall be given to it the titles of the waste land corresponding to the extension of that part."

As to the Contractor,—the real arrangement with him was as follows:—"That the contractor shall pay to the company interest at the rate of 2½ per cent. per annum on all capital which should from time to time be paid up in the company, during the time of the construction of the railway and works, and until such railway and works are delivered up to the company entirely completed, and fit for traffic in accordance with the plan, section, and specification: Provided that the liability of the contractor to pay such interest should cease when and so soon as he should have paid the company for such interest sums of money amounting in the aggregate to £20,000. That in order to provide a fund for the payment of such interest, it should be lawful for the company to deduct and retain £5 per cent. interest out of every payment to be made to the contractor until the sums so deducted and retained shall amount to £20,000, when the sums so deducted and retained should be passed to the credit of the contractor in interest account with the company, and such account should be debited at the end of every six months at the rate of 2½ per cent. per annum on the paid up capital of the company for the

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time being, until such debt should amount to the sum of £20,000, and until the completion and delivery up to traffic of the entire line." It was also alleged that he had been in pecuniary embarrassment, and so was not what the prospectus described him.

The cause was heard before Vice-Chancellor *Stuart*, upon interlocutory motion for an injunction; and on the 21st of March, 1865, the Respondent's bill was ordered to be dismissed with costs. On appeal to the Lords Justices, an injunction was granted, and the order of the Vice-Chancellor, dismissing the bill, was reversed (1).

This was an appeal against their Lordships' decree.

Sir *R. Palmer*, Q.C., and Mr. *W. Morris*, for the Appellants:—

This decree of the Lords Justices cannot be supported unless bad faith can be shewn on the part of the Appellants. There is no pretence for such a charge against them. In *Ex parte Briggs* (2), though the circumstances were somewhat different, the principle was laid down which ought to govern this case. There the shareholder had, as here, full means of knowledge; he had paid his deposit, and but for a difficulty arising from the rules of the *Stock Exchange*, would have sold his shares. The Master of the Rolls refused to relieve him from his liability. Here the Respondent applied for more shares than he really wanted; the number he applied for was allotted to him; he sought to have that number reduced; that was refused, and after that he paid the £2 deposit. He was not entitled, under such circumstances, to ask to be put in a better situation than other shareholders: *Nicol's Case* (3). There was no fraud here; yet fraud was suggested by the Respondent. When it was so suggested, it was most essential that it should be accurately set forth in the bill, and that the Court should be informed how it had arisen: *The New Brunswick, &c., Railway Company* v. *Conybeare* (4). So in *Jennings* v. *Broughton* (5), Lord Justice *Knight Bruce* said, that in such a case, "the title to relief depended on three questions: First, whether in the statements or representations made there was anything untrue, material in its nature, that is to say, which, taken as true, added substantially to the value of the mine, and was not conjectural merely. Secondly, if so, was any such untrue assertion published or made without a belief in its truth by the person or persons publishing or making it. And thirdly, if not, was the belief entertained without fair or reasonable ground?" It was impossible for the Respondent here to sustain his claim to relief on any of these grounds. And as to such cases in general, the true rule was laid down by Lord Justice *Turner*, when, in the same case, he said (1), "Finally, I think that, although it is the undoubted duty of the Court to relieve persons who have been deceived by false representations, it is equally the duty of this Court to be careful that, in its anxiety to correct frauds, it does not enable persons who have joined with others in speculations, to convert their speculations into certainties at the expense of those with whom they have joined. This, in my opinion, would be the effect of giving the Plaintiff the relief which he asks, and, I think, therefore, that this bill ought to be dismissed." That ought to be the case here.

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(1) 3 De G. J. & S. 122; 11 Jur. N.S. 646

(2) Law Rep. 1 Eq. 483; 12 Jur. N.S. 754 322

(3) 3 De G. & J. 387; 5 Jur. N.S. 205

(4) 9 H. L. C. 711, 724; 8 Jur. N.S. 575.

(5) 5 De G. M. & G. 126, 130.

The facts here [which were observed upon very fully] do not justify the charge of misrepresentation. In every substantial respect they were true. If they were expressed in rather too sanguine terms, that is no ground for setting aside the contract. Every prudent man is on his guard against high-flown language in a prospectus. As the prospectus referred to the articles of contract with the government and with the contractor, he had full means of knowing all the circumstances connected with the company, and forming his judgment upon them. There is no ground here to rescind the contract, nor any to grant the injunction to stay the action for calls. *Smith* v. *The Reese River Company* (2) will be relied on by the other side. There an injunction was granted to protect a shareholder against an action for calls, but that was where the directors themselves had rescinded the contract; and when that case afterwards came before the Master of the Rolls, on a motion to take the Plaintiff's name off the list of contributories, he refused the application. The Respondent here sought to obtain the benefit which was refused in that case, and his application could not be supported. Neither with regard to the

(1) 5 De G. M. & G. 140.

(2) Law Rep. 2 Eq. 264.

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directors, nor to the creditors of the company, had he a right to be relieved from the liability which he had voluntarily, and with full means of knowledge, incurred.

The Respondent knew all the facts in November, and ought then to have sought relief; his delay precluded him from afterwards asking for it.

The Respondent obtained the judgment of the Lords Justices on two matters only. He cannot now be heard to sustain it upon others.

Mr. *Dickinson*, Q.C., and Mr. *Swanston*, for the Respondent:—

There has been no unnecessary delay here. [The LORD CHANCELLOR:—We think that you need not enter on that point.] There may be allowance made for large expressions in anticipation of what a company will do and will gain; but if things are stated as facts, they must be truly stated. The party misled has a right to be removed from the list of shareholders: *Ship's Case* (1). Misrepresentation as to facts avoids the contract founded upon them. In *Nicol's Case* (2) the applicant had not only received a dividend, but he had sold his shares, and he was therefore held to be liable to be treated as a shareholder up to the time of the transfer. That case has no application to the present. So in *Jennings* v. *Broughton* (3), it was quite within the power of the purchaser of the shares to avoid being misled, for from the first he had ample means of knowing the facts, and had not relied on the advertisements; but even there it was declared that misrepresentations of a material kind would be sufficient to avoid the contract. In *Rawlins* v. *Wickham* (4) the delivery of a false account, to induce a person to become a partner in a banking business, was held sufficient to entitle him to have the contract rescinded, and that, too, although he had continued in the partnership for four years; and in *The New Brunswick and Canada Railway and Land Company* v. *Muggeridge* (5) it was held that a person contracting to take shares on the statements contained in a prospectus had a right, not only not to be misled by statements actually false, but was

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(1) 2 De G. J. & S. 544; 11 Jur. N.S. 331

(2) 3 De G. & J. 387; 5 Jur. N.S. 205

(3) 17 Beav. 234; 5 De G. M. & G. 126, 17 Jur. 904

(4) 3 De G. & J. 304; 5 Jur. N.S. 278.

(5) 1 Dr. & Sm. 363; 7 Jur. N.S. 132.

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entitled to be informed of all the facts the knowledge of which might reasonably influence his judgment in making the contract. The observations of Vice-Chancellor *Kindersley* were in that case very strong on this point. In *Price* v. *Macaulay* a misrepresentation as to the yearly value of some premises, occasioned by the suppression of the fact that that value arose from circumstances of a temporary nature only, was held sufficient to justify the rescinding of the contract. And the same result followed where houses were sold under the description of being "well supplied with water," when, in fact, though other houses near them were supplied with water from their own grounds, these houses were only supplied from the waterworks of the town: *Leyland* v. *Illingworth* (1). "A fraud may consist as well of the suppression of what is true as the representation of what is false," was said by Mr. Justice *Chambre,* in *Tapp* v. *Lee* (2); and that principle was acted on in *Foster* v. *Charles* (3), where a person who had recommended an agent by a statement which he knew to be false, was held liable in damages for the misconduct of that agent. *Dobell* v. *Stevens* (4), *Attwood* v. *Small* (5), *Reynell* v. *Sprye* (6), and *Burnes* v. *Pennell* (7), all proceed on the same principles. The last-named case contained some very strong observations by Lord *Campbell,* to which he adhered when Lord Chief Justice, in *The Deposit Company* v. *Ayscough* (8). And in *Wilkinson's Case, In re the Madrid Bank* (9) Lord Justice *Cairns* expressed his approval of the decision in the present case, although he held *Wilkinson* there to be liable, on the ground that he believed *Wilkinson* to have been fully informed of the facts. In *Oakes's Case, In re Overend* (10), Vice-Chancellor *Malins* recognised the principle that, in a case where fraud was practised by the promoters of a company, a person deceived by it would be released from his contract with the promoters, though as to creditors he might still continue liable. Where a party has been drawn into a contract by misrepresentation, he may compel the party making the misrepresentation to make it good, or, if that is impossible, he may

(1) 2 De G. F. & J. 248; 6 Jur. N.S. 811.

(2) 3 B. & P. 371.

(3) 6 Bing. 396.

(4) 3 B. & C. 623.

(5) 6 Cl. & F. 395.

(6) 8 Hare, 269; 1 De G. M. & G. 660.

(7) 2 H. L. C. 497.

(8) 6 E. & B. 761; 2 Jur. N.S. 812.

(9) 15 Weekly Rep. 499.

(10) Law Rep. 3 Eq. 576. Affd 2 H.L. 325.

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avoid the contract: *Pulsford* v. *Richards* (1). Here there are many misrepresentations sufficient to avoid the contract; and the only parties in contest being the directors who made those misrepresentations and the party who was misled by them, he is entitled to relief.

The Respondent is entitled to sustain the decree, not only on the grounds on which it was rested by the Lords Justices, but on all those stated in his bill.

Sir *R. Palmer*, in reply:—

It is not contended that any principle of law is in doubt in this case, but only the application of the principle. For that purpose alone the case of *The New Brunswick Company* v. *Conybeare* was cited. That case shews that, if fraud and deception are relied on, they must be clearly alleged and distinctly proved. *Burnes* v. *Pennell* is to the same effect, and shews too the difference which exists, applying the rule to set aside an executed contract, or to give effect to one which is purely executory. *Price* v. *Macauley* and *Leyland* v. *Illingworth* were cases of specific performance. In *Rawlins* v. *Wyckham* there had been a direct misrepresentation of a positive fact. There was none here. In *Ship's Case* (2) there was no answer given to the applicant's positive statement on oath that he was not informed of the facts, and on that ground he was held entitled to relief. In *Jennings* v. *Broughton* the Master of the Rolls declared (3), that "it is always to be borne in mind, in suits of this nature, that the burden of proof is on the Plaintiff." He had said the same thing in *Pulsford* v. *Richards* (4). The Respondent here has not fulfilled that condition, on the performance of which he is alone entitled to ask for relief.

May 14. THE LORD CHANCELLOR (Lord *Chelmsford*), having stated the facts of the case, said:—

The Respondent alleges that the prospectus which induced him to purchase the shares contains fraudulent representations, which entitle him to have the purchase declared void. The Appellants, denying that there are any false representations in the prospectus, contend that the Respondent's delay in instituting his suit as soon as he had knowledge, or means of knowledge, of all the facts, is fatal to his claim to relief.

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(1) 17 Beav. 87; 17 Jur 865
(2) 2 De G. J. & S. 544; 11 Jur NS 331
(3) 17 Beav. 239; 17 Jur 907.
(4) Ibid. 87; 17 Jur 865.

There is some little uncertainty as to the exact time when the Respondent made the discovery that the representations in the prospectus were not *bonâ fide.* He at first said that it was within three days after receiving his letter of allotment, which would be as early as the 16th of July; then, that it was after he had paid the £1 and the £2, the latter being the call on his 100 shares, which was paid on the 25th of July.

In his bill the Respondent states, that "it was in or about September, 1864, he heard rumours that the statements in the prospectus were, to a great degree, false; that on the 22nd of November he went to the office of the company, when certain documents were produced, and from them he, for the first time, learnt with certainty that the statements contained in the prospectus issued by the company were false in many particulars."

The fair result of these statements appears to me to be, that although the Respondent might have heard unfavourable rumours, and conceived suspicions of the company, at an early period after he obtained his shares, yet that he received no certain information upon which he could act until the month of November, and he did nothing between that day and the 28th of January, 1865 (when he filed his bill), which amounted to acquiescence. This case differs in this respect from that of *Ex parte Briggs* (1), which was mainly relied upon in support of the objection of delay, for there, Mr. *Briggs*, after he discovered that the representations in a prospectus, on the faith of which he was induced to take shares, were false, dealt with the shares as owner by instructing his broker to sell them. The Respondent, therefore, has not precluded himself by laches from his right to have the contract for the purchase of shares in the company rescinded, provided he has clearly and distinctly alleged in his bill the fraudulent representations (or any of them) upon which he relies, and has established them by satisfactory evidence.

(1) Law Rep. 1 Eq. 483; 12 Jur NS 322

The alleged representations are contained in a prospectus, the object of which was to invite the public generally to join the proposed undertaking. In an advertisement of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent man will accept the prospects which are always held out by the originators of every new scheme, without considerable abatement.

4 Ch 577
30 Ch D, 732

But although, in its introduction to the public, some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking, may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted. In my opinion, the public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements. As was said by Vice-Chancellor *Kindersley*, in the case of the *New Brunswick and Canada Railway Company* v. *Muggeridge* (1), "those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

6 HL 381
5 Eq 242
13 Eq 92

Applying these principles to the prospectus in question, I proceed to consider the grounds upon which it is impeached by the bill of the Respondent. Although the Lords Justices decided in favour of the Respondent upon two only of the alleged misrepresentations, or, rather, concealments of facts, in the prospectus, and

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(1) 1 Dr. & Sm. 381; 7 Jur N.S. 132

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expressed an opinion against him upon the others, it is quite open to him to maintain the decree upon any of the grounds laid in his bill, and accordingly the argument on his behalf has been extended to every misstatement in the prospectus, which he has attributed to the company.

I will pass lightly over those misstatements in, or omissions from, the prospectus, which, in my opinion, do not establish a case against the Appellants; agreeing, however, with the remark made in the course of the argument for the Respondent, that the suppression of a fact will often amount to a misrepresentation.

I do not think that there is anything in the omission from the prospectus of all mention of the deposit of £20,000 which the company was to make, and which was to be forfeited if the construction of the railway was not commenced by a certain day. The Respondent alleges, in his bill, that the Appellants, by undertaking only one line of the railway, and neglecting to commence or undertake another, are liable to forfeit the £20,000. It appears to me that the omission to mention this required deposit would be no evidence of wilful suppression of the truth, even if the liability to its being forfeited existed. The effect of the deposit would be to quicken the diligence of the company to commence the works, in order to obtain its return. And if the fact of the deposit being in jeopardy by anything which occurred after the issuing of the prospectus can have any bearing upon the statements it contains (which I think it cannot), the evidence shews that the railway has been commenced within the time limited, so as to entitle the company to have the deposit restored.

The next allegation of fraudulent concealment which I will deal with relates to certain shares which, under the contract with the Venezuelan government, the original concessionaries were to have a right to reserve to themselves, as privileged shares, to indemnify them for costs incurred by them up to the date on which they should open the subscriptions to the public. By a document, called "Explanations of the Contract," these shares were not to exceed 2075; 575 to be considered as paid by anticipation for the preliminary expenses, and 1500 as a compensation to the promoters of the undertaking. The Plaintiff alleges, that if these privileged shares had been mentioned in the prospectus he would not have purchased his shares. The truth of this assertion cannot, of course, be ascertained. But the answer to this charge is, that although the benefit of these privileged shares passed to the company under the purchase of the concession, there never has been any intention to act upon this clause in the contract, nor any provision in reference to it stated by the Appellants, and, therefore, there was no occasion to mention the privilege in the prospectus.

The next charge to be considered is one of alleged misstatement: —that, amongst other privileges secured to the company, is one of "a free grant of 30,000 acres in the provinces through which the railway is to pass." This the Respondent asserts in his bill to be untrue, for that it was expressly provided that the land to be granted should be 30,000 acres only, which were to be nowhere but in the provinces to be benefited by the railway, and that, too, with this condition annexed, that no land should be granted which was owned by Venezuelans. Another ground of misrepresentation was urged in argument, viz., that the prospectus states that the country through which the railway is to pass is a most productive one for produce of various kinds, besides being a rich agricultural district, leading (as it was said) to the belief that the 30,000 acres were to be of land of this quality, instead of which it was expressly stipulated in the decree which authorizes the executive power of *Venezuela* to arrange the contract for the *Central Railroad*, that the lands were to be "waste lands."

It seems to me, however, to be clear, that this description refers, not to the quality of the soil, but to the lands being unoccupied; a view which is confirmed by the qualification annexed to the proposed grant, that in the grounds ceded those "are not included which, with any title, the Venezuelans" (extended afterwards to foreigners) possess at the time of the publication of the decree. The Appellants were, in my opinion, warranted in stating that the grant was a free grant of 30,000 acres, without mentioning the qualification of its not extending to private property (which would of course be implied), or that the 30,000 acres were to be granted only out of the provinces to be benefited by the railway, and in case there should be none such, the concession was to remain without effect. There is no reason to suspect that the Appellants had any doubt that the quantity of land conceded could be found within the limited district, and the Venezuelan government bound itself to apply to the convention, or constitutional congresses, "in order that it might prevent the alienation of waste lands in the provinces through which the railroad was to pass, until the plans of the latter being presented, and its extension determined, they might designate those which, according to the contract, were to belong to the company."

I now proceed to consider an alleged misrepresentation upon which the Lords Justices thought that the Respondent had established a case against the Appellants. This relates to the statement in the prospectus, that there was secured to the company the privilege of a guarantie of 9 per cent. interest on all calls paid on account of the subscribed capital for a period of twenty years, amply secured by a cession of the import duties of *La Guayra* and *Puerto Cabello.*

The Respondent charges in his bill that this statement is entirely untrue, and that the import duties are already mortgaged for their full value to other persons. The proof of the mortgage of the duties to their full value fails, as it appears that they were previously mortgaged only to the extent of 55 per cent.

But it is said by the Respondent that the statement of the prospectus is untrue, because the government of *Venezuela* was not to pay the 9 per cent. in case the railroads were not producing any interest on account of any cause imputable to the company. I doubt whether the allegation in the bill places the untruth of the statement upon this ground. But admitting that it does, I do not see how the omission of the qualification can be regarded as a fraudulent suppression of the truth. Even if no mention of it had been made in the agreement for the guarantie, I should suppose it would necessarily be implied; for no party can claim the benefit of a contract the right to the performance of which arises from his own default; and no one could possibly suppose that such an absolute and unqualified guarantie would ever be given. At all events the omission to notice such a qualification does not appear to me (with great respect to the Lords Justices) to be a ground for attributing to the Appellants a fraudulent intention to conceal the truth.

Thus far I have examined the various allegations of fraudulent misrepresentations and concealment in the prospectus of the Appellants, and have been unable to discover anything upon which, if they had stood alone, the Respondent could claim to have his purchase of shares set aside; but I proceed to a part of the case which not only leads to a different conclusion, but also reflects upon the general fairness of the prospectus, even in the particulars which I have been considering.

The portions of the prospectus to which I am about to refer appear to me to be more or less connected with each other, and all of them bear upon the important question of the ability of the Appellants to perform the contract into which they have entered, with the means at their disposal, and by the contractor with whom they had engaged.

The misrepresentations and concealment alleged in the bill under these heads relate—

1. To the omission from the prospectus of all mention of the purchase of the concession by the Appellants for £50,000.

2. To the statement that the contract was entered into with a responsible contractor.

3. To the contract being considerably within the available capital.

4. To the liability of the contractor upon his guarantie of 2½ per cent. being limited to £20,000.

The Respondent alleges in his bill that the purchase of the concession by the company for £50,000 was fraudulently concealed. It is difficult to understand how such an important fact can have been honestly omitted from the prospectus. It cannot be said that the amount of the capital of a company is an insignificant matter for the judgment of those who are invited to become shareholders. The prospectus states the capital to be £500,000, whilst it was well known to those who prepared it that the company was established upon the footing of a payment of £50,000, which necessarily reduced the capital by that amount.

It was said by the counsel for the Appellants that when the prospectus stated that the railway was to be constructed and worked under a concession and important guaranties from the government of *Venezuela* every one would understand that such a valuable privilege was not likely to be granted gratuitously. But I see no reason why it is to be assumed that persons reading the prospectus would take for granted that the Venezuelan government would not make a gratuitous concession for the construction of a railway which might prove highly beneficial to the country. At all events, the terms of the prospectus import a direct concession and guaranties from the Venezuelan government, which might or might not be gratuitous, instead of stating the fact, that the Appellants had acquired the concession by purchase from the original concessionaries.

The Appellants also rely upon the fact that the Respondent was expressly referred by the form of the letter of application for shares to the memorandum or articles of association, the latter of which documents expressly mentioned the agreement for the purchase of the concession. But the Respondent applied for shares upon the faith of the prospectus, a copy of which was sent to him, and when the allotment of the 100 shares was made to him he was, in the opinion of the Appellants, fixed as a shareholder, as appears from a letter from their secretary in answer to an application from the Respondent to have the number of shares allotted to him reduced. In that letter he was told that this was not in the power of the Appellants, "as it would make the allotment illegal." It appears to me that there was an intentional and improper suppression as to the extent of the capital of the company by the description in the prospectus.

The next statement in the prospectus to be considered is that which represents that a contract had been entered into with a responsible contractor for the completion of the line from *Puerto Cabello* to *San Felipe*. A responsible contractor of course must be one who has the means at least of commencing the performance of his contract, though he may rely upon the money to be received in the progress of the works to enable him to complete it.

Now it appears to me that *Croskey* was a person who ought to have been known by the directors not to be a responsible contractor in this sense. I do not rely upon the fact of his insolvency in four months after the date of the contract, as that does not necessarily prove that he might not have been in a

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position to carry out the contract when he entered into it. Coupled with other circumstances, however, it is a significant fact. If *Croskey* had no means of his own, the payment of part of the contract price by 4000 shares, upon which he was to pay a deposit, would rather disable him from performing his contract. And the mode in which that deposit was paid, by an advance from the financial company, to be repaid out of the moneys *Croskey* would receive under the contract, ought to have raised a serious doubt as to his responsibility. This would hardly be removed by the security which he gave of a bond for £10,000 with two sureties, which is quite insignificant in comparison with his engagements. I do not think that the directors were justified in holding *Croskey* out to the world as a responsible contractor, and whether this was carelessly or designedly done seems to me to be immaterial.

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The next alleged misrepresentation is of a serious character, and, as it appears to me, is completely established. The prospectus states that the contract entered into with the responsible contractor is "at a price considerably within the available capital." This statement connects itself with the representation of the amount of the capital. The Respondent, believing the capital to be £500,000, even if he had known that the contract price was £420,000, would no doubt have been satisfied that a sum of £80,000 being left, the statement that the contract was for a price considerably within the available capital was well founded; but if he had known, as the directors knew, that what remained after providing for the contract was only £30,000, he might have entertained a different opinion. I do not think that the £20,000 deposit ought to be deducted, because, although it was tied up until the commencement of the works, yet at that period it would be released, and would then form part of the available capital. Nor, on the other hand, ought the borrowing powers given to the directors by the articles of association to be taken into account, as suggested in argument, for no one would understand a power to borrow as intended by the term "available capital" of a company. It certainly was an exaggeration, to say the least of it, to describe a contract which would absorb the whole of a capital of £450,000, except £30,000, as being considerably within the available capital.

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It appears to me that this was not a fair and honest representation, but was calculated, if not intended, to deceive the public, who were invited by the prospectus to take part in the undertaking.

The last ground upon which the bill charges fraud on the prospectus is the omission to state the limitation to £20,000 of the contractor's guarantie of 2½ per cent. Lord Justice *Turner* thinks that in common honesty this limitation should have been mentioned, and I agree with him. But I should have hesitated, if the prospectus had been unimpeachable in every other respect, to have decided against the company upon this alleged concealment alone. That it ought to have been mentioned, so as to allow those who were asked to join in the undertaking to form a judgment upon it, there can be no doubt; and, looking to the other instances of suppression of facts material to be known, I cannot avoid the conclusion that this, amongst the rest, was designed for the purpose of deception, by concealing whatever would make the scheme less attractive, and so prevent persons from becoming purchasers of shares.

But the Appellants say that even admitting the prospectus to be open to the objections which are made to it, the Respondent has no ground of complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail himself; that he was told by the prospectus that "the engineer's report, together with maps, plans, and surveys of the line, might be inspected, and any farther information obtained, on application at the temporary offices of the company;" and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus.

2QB 601
0 Ch 520 n.

But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." I quite agree with the opinion of Lord *Lyndhurst*, in the case of *Small* v. *Attwood* (1), that "where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised; and in a Court of equity a foundation is laid for setting aside the contract which was founded upon that basis." And in the case of *Dobell* v. *Stevens* (2), to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he thought proper.

Upon the whole case I think the decree of the Lords Justices ought to be affirmed, and the appeal dismissed with costs.

LORD CRANWORTH:—

My Lords, the decree of the Lords Justices now under appeal was based on the principle that Mr. *Kisch*, the now Respondent, had been induced to take his 100 shares by means of false representations held out to him by the prospectus issued by the Appellants. The only question is, whether it is sufficiently alleged and proved that such false representations were made. I think it is, and so that the decree ought not to be disturbed.

The prospectus states that the object of the company is to construct and work a *Central Railway* in *Venezuela*, under a concession from the government, the first section being from *Puerto Cabello* to *San Felipe*, a distance of about fifty-four miles; and then, a little farther on, the prospectus proceeds to say that the government has by a decree and concession granted the right of making

(1) 6 Cl. & F. 395.

(2) 3 B. & C. 623.

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the *Central Railway* from *Puerto Cabello* westward to *San Felipe* and southward to *Valencia*, with power of extension to *Carracas*, and has bound itself for twenty-five years not to grant any other concession for the construction of a railway in the direction of the *Central Railway*.

The obvious and natural, though not, perhaps, necessary meaning of these paragraphs is, that the decree and concession spoken of was a decree and concession to or in favour of the company issuing the prospectus. But even if that be not the necessary meaning of the paragraphs taken by themselves, yet it seems to me that they admit of no other construction when read in connexion with the preceding part of the prospectus.

The prospectus opens by describing the company as incorporated under the Act of 1862, "for the construction and working of a *Central Railway* in the Republic of *Venezuela*, under a concession and important guaranties from the government," and then, after stating that the first section from *Puerto Cabello* to *San Felipe* was about fifty-four miles, it proceeds to state that the capital was £500,000, in 10,000 shares of £50 each.

The question here arises, for what purposes was the capital to be raised? Evidently, according to the context, for constructing and working a railway. Any one becoming a shareholder in the company on the faith of the prospectus must have supposed, that, assuming all the shares to be taken, the company would have £500,000 for constructing and working the railway under a concession from the government. This is what the prospectus represents, and what it was plainly intended to represent. But it is untrue. The capital was already, before the prospectus was issued, liable to the payment of £50,000, to be applied, not in constructing or working the railway, but in purchasing from intermediate concessionaries the right to make it. So that the capital for constructing and working the railway really was only £450,000, not £500,000, as represented by the prospectus. This fact ought, in common honesty, to have been disclosed to those who were taking shares. It appears to me that in the matters I have indicated there has been both *suppressio veri* and *suggestio falsi*, and that the Respondent is entitled to the relief given to him by the decree of which the Appellants have complained.

It was indeed contended that it cannot be supposed that the prospectus meant to represent the capital of £500,000 as a free, unincumbered capital to be employed in constructing and working the railway, for the articles of association expressly declare that the directors shall adopt and carry into effect the contract or agreement bearing even date therewith, already entered into on behalf of the company by the subscribers, for the purchase of the concession for the construction of the railway. The contract or agreement so referred to was no doubt the agreement for purchase of the concession from the *National Finance Company* at the price of £50,000; and if, when the Respondent took his shares, he is to be deemed to have had notice of what is so contained in the articles of association, the argument of the Appellants is unanswerable.

But I am of opinion no such notice can be imputed to him. The *Winding-up Act*, 1862, provides (sect. 16), that the articles of association shall bind every member of the company as if he had subscribed and sealed the same, and had covenanted to conform to all the articles thereof. If the Respondent had actually subscribed and sealed these articles, he certainly could not have alleged want of notice as to the purchase of the concession out of the £500,000 capital. But he never did subscribe or seal them; and in order to make them binding on the Respondent, under the provisions of the statute, it is necessary to shew that he had become a member of the company. The case of the Respondent is, that he never was a member; that all which he did was to act on the faith of the prospectus; and if the prospectus stated what was untrue he is entitled to treat all which he did in reliance on its being true as absolutely null and void.

Port. 345

The statute only meant to bind those who had actually become members. Any one who had without fraud taken shares could not allege ignorance of anything contained in the memorandum of association or in the articles of association, merely because he had not signed or sealed them; but if he never actually signed or sealed them, nor had notice of what they contained, the statute cannot be taken to impute to him knowledge of their contents, so as to protect those who, by a fraud, had induced him to do that which, in the absence of fraud, would have precluded him from

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saying he was ignorant of their contents. The statute does not authorize any one to sign or seal the instruments in question till after he has become a member. The case of the Respondent is that he never was a member, for that he was induced to take shares by fraudulent representations, which entitle him to repudiate and treat as null all which he was so induced to do.

I had at one time doubted whether this ground of fraud was sufficiently alleged in the bill; but I am satisfied that it is. In the 14th paragraph there is an express charge that the prospectus fraudulently concealed from the Plaintiff the fact that the company had purchased from the *National Financial Company*, for £50,000, the concession to make the *Central Line of Railway*. And that seems to me to involve substantially the whole question.

This being my view of the case, it is unnecessary that I should examine the other alleged frauds; I am ready, however, to say that many of them, if standing alone, would not have appeared to me sufficient to warrant the relief asked; but with respect to the omission to state that the contractor's guarantie was limited to £20,000, I am strongly disposed to concur with the Lords Justices. It may be that there is little probability of the guarantie of 2½ per cent ever reaching that amount; but that is a point on which the prospectus ought to have left all persons taking shares to form their own opinion. There would have been no difficulty in stating the limitation, and I should be reluctant to encourage the notion that it was lawful to persons framing a prospectus to decide for themselves that such a restriction need not be mentioned.

The result of my examination of this case is, that I concur with my noble and learned friend in the conclusion that the appeal ought to be dismissed, with costs.

LORD ROMILLY :—

My Lords, as I concur in the observations which have been made by my noble and learned friend, the Lord Chancellor, and by my noble and learned friend opposite, I think it is unnecessary for me to say more than that I agree in the reasons they have assigned as inducing your Lordships to come to the conclusion that this decree ought to be affirmed.

It is in my opinion not merely by one or two statements in the prospectus, which are not borne out by the facts, that the matter ought to be tried, but by the combined effect of them all producing a result which would have misled any person who took shares upon the faith of the prospectus; but I think also it is very important that your Lordships should by your judgment affirm two propositions, which, I apprehend, are intended to be affirmed by the observations of my noble and learned friend, the Lord Chancellor.

The first is, that contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual.

The second proposition, which is also one of great importance, and was particularly alluded to in some of the observations of my noble and learned friend opposite, had reference to the question how far a person who applies for shares in a company is bound by the articles in the memorandum of association. On that subject I would observe that a contract between a company and an individual differs from a contract between two individuals alone in this respect, that upon the faith of his becoming a member of the company various persons are induced to deal with the company, and to become shareholders, which they would not do, except upon the belief that he was a member of it. The result is, that it becomes necessary for him, in order to set aside a contract of this description, that he should come with the utmost diligence for that purpose, so that no person may be misled by the fact of his remaining a member of the association. In this case, that question was minutely gone into by the Lord Chancellor, who shewed, in my opinion, that the party is not debarred by any laches on his part from raising that question. But if a person takes shares in a company, and forbears to make any examination into it, and becomes bound by the articles of association, and continues his connexion with it for a time, by which other persons may be induced, upon the credit of

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his name, to take shares in the association, or to deal with it, then I apprehend that your Lordships will be of opinion that it is too late for him to get rid of his liability on the ground of his having been induced by false representations to take shares in the company. These are the only observations I desire to add to those which have been addressed to your Lordships by my noble and learned friends, in which I fully concur.

LORD COLONSAY:—

My Lords, I entirely concur in the result at which your Lordships have arrived, that this judgment should be affirmed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, May 14, 1867.

Solicitors for Appellants: *Ashurst & Co.*
Solicitors for Respondent: *E. L. Sidney & Son.*

HARRIET CATON . . . . APPELLANT;

AND

R. R. CATON AND T. B. CATON . . . . . RESPONDENTS.

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May 13, 14, 16, 20

Statute of Frauds—Memorandum—Signature—Will.

19 Eq 177
4 Ch D 71
24 QBD 32
5 Ch D 88
7 Ch D 65, 67
4 CPD 45
5 QBD 305
14 QBD 175

Though it is not necessary that the signature of a party should (within the *Statute of Frauds*) be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate every material and operative part of the instrument. Where, therefore, the name of the party against whom specific performance was sought to be enforced, appeared in different parts of the paper, but only in such a way that, in each case, it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of promise or undertaking:—

Held, that the paper did not constitute a contract signed within the provisions of the *Statute of Frauds.*

C. proposing to marry *H.*, wrote out a paper beginning thus: "In the event of a marriage between the under-mentioned parties, the following conditions as a basis for a marriage settlement are mutually agreed upon." Then followed several sentences, each in this form, " *C.* to do so and so, *H.* to have so and so." No name of either party was signed to the paper, which was delivered by *C.* to *H.'s* solicitor for the purpose of drawing the settlement. Two of the clauses in it appeared to have been, by mutual arrangement, struck out. No settlement was ever executed; it was dispensed with by *H.* at *C.'s* request, upon *C.'s* verbal promise to give *H.* certain advantages by his will. *C.* died, and the will was not found to fulfil the promise:—

Held, that *H.* was not entitled (independently of the question, whether, as a matter of fact, there had been any waiver) to specific performance of the arrangements mentioned in the written paper, as it did not constitute a contract within the meaning of the *Statute of Frauds.*

RICHARD BEWLEY CATON was a clergyman of the Church of *England.* In the autumn of 1852, when about seventy-eight years of age, he made proposals of marriage to Mrs. *Harriet Henley,* widow, then about sixty years of age. Both parties were possessed of property, the lady holding some, hereinafter called the Irish property and producing £80 a year, under a settlement made upon a former marriage, and secured to her separate use. Her other property consisted of money on mortgage and of railway securities. It was arranged that a settlement should be made on the intended marriage, and in December, 1852, Mr. *Caton* wrote out a paper in the following terms:—

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"*Chester* and *Holyhead* debentures	£4,000
"*Manchester* and *Holyhead*	3,000
"*Pickering* estate mortgage	2,000
"Mr. *Cole's* mortgage	2,000
"Irish property, annual value, say	80

"In the event of marriage between the under-mentioned parties, the following conditions, as a basis for a marriage settlement, are mutually agreed upon. Mrs. *Henley* to have the whole of her fortune settled upon herself (under trustees, one to be named by Mrs. *H.*, and the other by Mr. *Caton*), and to go to the uses of her will. But the annual interest on her fortune to be received and taken by the Rev. *R. B. C.* for and during his life, with the exception of £80 a year to be paid to Mrs. *H.* under the denomination of pin-money."

"The house, coach-houses, and stables, No. 75, *Seymour Place, Bryanstone Square,* the property of the Rev. *R. B. C.*, is given to Mrs. *H.* for her life, at her decease to go to the uses of Mr. *Caton's* will. Also his household furniture, plate, linen, and china, given, at his decease, to Mrs. *H.* in whatever house they may reside."

"Memorandum omitted at the proper place. Mrs. *H.* to have liberty to withdraw £2000 for the purchase of a house, said house to be settled upon herself" (1).

"All property that may fall into Mrs. *H.* during our marriage to be her sole property, and subject to the uses of her will, but her husband to have the annual rent or interest of said property during his life."

"Mrs. *H.* to be entitled to receive at my death the half-years' rents that shall then be due, or becoming due, arising from her property" (2).

This paper, though in the handwriting of Mr. *Caton,* was not signed by him, nor was it signed by Mrs. *Henley,* though she was made aware of its contents, and agreed to them. On the 29th of December, 1852, Mr. *Caton* and Mrs. *Henley* attended at the office of Mr. *Emmet,* solicitor, in *Bloomsbury Square,* and acquainted him with their arrangements, and Mr. *Caton* handed to him this paper to prepare a marriage settlement. He was named trustee for Mrs. *Henley*, and the Rev. *Trewell Moore* was named trustee for Mr. *Caton*.

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(1) In the copy of this instrument printed in the Appendix to the Cases, and declared by the Respondents to be a fac-simile, this sentence was marked as struck through with a pen.

(2) This sentence was marked in the same manner.

The draft settlement was prepared, and the two parties saw it at Mr *Emmet's* chambers on the 6th of January, 1853. On their way home, Mr. *Caton* complained of the length of the settlement, and proposed to her that, in order to diminish the expense of it, all mention of her Irish property should be omitted, as that was already settled to her separate use. She consented. The draft was altered accordingly, and a copy sent to Mr. *Caton* on the 11th of January. Mr. *Caton* then represented to Mrs. *Henley* the great expense that the settlement would occasion, which he proposed to save altogether, and, as she alleged, he promised, if she would forego its execution, strictly and faithfully to carry into effect the terms of the memorandum, and to leave to her, by his will, the whole of her then and after-acquired property, and to give her his house in *Seymour Place* for her life, and to give her absolutely all the furniture, plate, linen, &c., in and about his residence at the time of his death, and promised that she should not in any way be injured by consenting to what he proposed. She did consent to it, and communicated her wishes to Mr. *Emmet*, who, both by word of mouth and by letter, remonstrated against her so consenting (1). She shewed

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(1) His letter was in the following terms:—

"*Bloomsbury Square*, 4 Feby. 1853.

"My dear Mrs. *Henley*,—It would appear strange were I to say that a day has not passed since you left town that my thoughts have not dwelt on our last interview, and I felt and still do feel, the very deepest anxiety for your future welfare. It is however, impossible for me to allow you to change your present state and place yourself in a position by which you will be deprived of all your fortune and left entirely at the mercy of another for your future existence, without once again raising my warning voice against such a very unjust proceeding. Since I saw you, a case has occurred in my own office which fully justifies all I have said on the subject. The marriage took place a year since last October. The gentleman, a widower with three children, aged sixty, and the lady aged about fifty; they have quarrelled and separated. The lady finding it impossible to endure his conduct, left the house and went to her sister's. Fortunately she had all her fortune (£500 a year) settled, and she is consequently now quite independent of him. What would have been the case had she had no settlement? She must have returned to her husband's house or starved.

"Now I will suppose, in your case,

this letter to Mr. *Caton*, who was very angry that his word should be doubted. She adhered to her promise to Mr. *Caton*. The marriage took place on the 7th of February, 1853, and, before the ceremony, Mr. *Caton* produced a will which appeared to be in conformity with his promises, and which he executed as soon as the ceremony had been performed. During his life he took possession of his wife's property, and also received several sums of money which fell to her on the deaths of other people, amounting to £1360. This was shewn by a memorandum of his own. He paid her the sum of £80 a year. In one of his own memorandum books was an entry by him in these words: "Mrs. *Caton's* fortune, Feb. 7, 1853," and the particulars which followed were added up by him, and were stated at "£14,904." By arrangement between them, the house in *Seymour Place* was sold, and the proceeds, amounting to £775, were invested in 3 per cent. consols.

Mr. *Caton* died on the 24th of January, 1864, and it was then found that, on the 4th of May, 1863, he had, without the Appellant's knowledge, made a will, revoking all others, and leaving his household furniture, linen, &c., to the Appellant absolutely, and two leasehold houses, No. 9, *Seymour Place*, and No. 2, *Mitford Place*, to her for life, the income of *Cole's* mortgage to her for her life, but the principal to the Respondents, in equal shares, at her death; and he made other similar dispositions,

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that the will is duly executed at the time and place named, and that it is to the effect promised; then suppose a quarrel, and the will is thrown into the fire, and another made, leaving you a paltry pittance, perhaps £100 a year; and remember, too, you will be in ignorance of the change until death shall have removed him far beyond the reach of all reproaches. What will you say then, and you incur the possibility of such an event taking place, when (if the gentleman is acting honourably) there cannot be the least objection to your having your fortune settled upon yourself in accordance with his promise to you, and your promise to me. Do let me beg of you to pause and well consider the consequence before you lose all your fortune, and for ever. Once married, and your power is gone. You can do nothing then, but utter vain regrets. Pray excuse my writing in this strain, and attribute it to the very great interest I feel in your future welfare as your brother, for you will remember you begged of me years ago to act towards you, and watch over you, as a brother. With my best wishes for your future happiness in whatever state you may be, and wherever you may be, believe me,

"My dear Mrs. *Henley*, yours truly,
"*Geo. N. Emmet.*"

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the result of which was, as she alleged, that, under this will, the income which she should derive would amount to £400 a year, a sum smaller than that which she had, previously to the marriage, enjoyed from her own fortune. The Respondents were made his general devisees and legatees. The gross amount of his property was stated to be, in realty about £50,000, and in personalty about £40,000.

On the 15th of April, 1864, the Appellant filed her bill (which was afterwards amended) against the Respondents, and prayed that the terms of the agreement contained in the memorandum drawn up by Mr. *Caton*, and delivered to Mr. *Emmet*, might be decreed to be carried into effect, and that she might be declared entitled to the property therein specifically mentioned as the fortune of which she was possessed at the time of her marriage, and to her after-acquired property, and to the annual income thereof accrued since Mr. *Caton's* death, and to the consols representing the sum of £775, the proceeds of the sale of the house, No. 75, *Seymour Place*, and for general relief.

The Respondents put in their answer, denying the existence of any agreement, and they pleaded the *Statute of Frauds*.

The cause came on for hearing before Vice-Chancellor *Stuart*, on motion for a decree, in May, 1865, when His Honour pronounced judgment in favour of the Appellant (1). On appeal, this decree was reversed by Lord Chancellor *Cranworth* (2).

Sir *Roundell Palmer*, Q.C., and Mr. *C. Locock Webb*, for the Appellant:—

The execution of the deed of settlement here was abandoned, but not the contract on which the deed was to have been founded. There was a promise before the marriage—that promise still subsists in the form of the memorandum given to Mr. *Emmet*, there never has been any waiver of it, and the written statements of the amount of Mr. *Henley's* property, made by the husband himself, are in accordance with it.

The first question here is, whether what was done by Mr. *Caton* amounted to a signing of this memorandum so as to make it a

(1) 34 L. J. (Ch.) 564.

(2) Law Rep. 1 Ch. 137; 12 Jur NS 171

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binding contract within the meaning of the *Statute of Frauds.* That question ought to be answered in the affirmative. In *Hammersley* v. *De Biel* (1), the brothers of the lady wrote on their father's behalf some things described as "the bases of the arrangement," and though these things were declared at the same time to be "subject, of course, to revision," and were not mentioned in the settlement that was afterwards executed, yet the Court enforced the performance of them. [Lord WESTBURY:—Is that in point with the case of a document which is prepared as instructions for a settlement?] It is. The substance is the agreement; the deed of settlement is merely the form. Here the memorandum speaks of the "basis mutually agreed upon." [Lord WESTBURY:—"Basis for a marriage settlement;" the purpose of the instrument is important.] In that case the bases were declared to be subject to revision, yet there the memorandum was deemed to be sufficient within the *Statute of Frauds.* The question here really is, what was meant to be abandoned. The Appellant contends that it was nothing but the execution of the deed, the contract itself remaining as before. If so, there is then a good binding contract, sufficient to satisfy the *Statute of Frauds.* In Lord *Cottenham's* judgment in the Court of Chancery, in *Hammersley* v. *De Biel* (2), it is expressly said that "no formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this Court, for the purpose of realizing such representation." Here the Appellant did act on the faith of the representation. The only object of withdrawing from the execution of the deed was its expensiveness, and the promise was that a testamentary form should supersede the necessity for it. The case of *Montacute* v. *Maxwell* (3), as first presented to the Court, does not affect the present, for the decision there only proceeded on the insufficiency of the allegations in the bill. When the bill was amended the Defendant was ordered to answer it (4).

Trusts may be created by declarations of intention, as in *Podmore*

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(1) 12 Cl. & F. 45.

(2) Ibid. 62, n.

(3) 1 P. Wms. 618; 1 Eq. Cas. Ab. 19; Prec. in Ch. 526.

(4) 1 Str. 236.

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v. *Gunning* (1); *Wallgrave* v. *Tebbs* (2); a principle which may properly be applied to this case.

The memorandum here constituted a contract. It was in the handwriting of Mr. *Caton*, his own name and that of his intended wife appear in it, and it is declared to be a paper containing the conditions which were the bases mutually agreed upon "by the under-mentioned parties." The use of their names and initials after that declaration was quite sufficient to make it a writing signed by him within the *Statute of Frauds*, for it is not necessary that such a paper should be subscribed. It is a sufficient signature if the party to be bound introduces his name into any part of it: *Ogilvie* v. *Foljambe* (3). That has the effect of authenticating it, and it does not matter in what part of the paper the name so authenticating it is found: *Saunderson* v. *Jackson* (4). In *Mundy* v. *Jolliffe* (5) there was no signature of the landlord, nor was his name even mentioned in the paper, though the tenants' name was mentioned, yet the tenant was held entitled to a decree for specific performance.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Greene*, Q.C. (Mr. *Elderton* was with them), for the Respondent:—

The duty of shewing clearly the existence of such an agreement as is alleged in the bill rests upon the Appellant, and that duty has not been performed. There is nothing in this case which satisfies the requirements of the *Statute of Frauds*. The memorandum relied on by the other side is not an agreement or a contract; and it is not signed. It is a mere paper of instructions given to the solicitor to prepare a settlement. It was subject to variation, and therefore cannot be enforced as a contract: *Goss* v. *Lord Nugent* (6). It is not denied on the other side that part of the memorandum was struck through. How then can it be called a concluded agreement. [THE LORD CHANCELLOR:—But was it not a note or memorandum in writing by the party to be charged?] That would not be sufficient if it was only a note of a proposal or negotiation, not of a settled agreement. If it had borne the latter

(1) 7 Sim. 644.
(2) 2 K. & J. 313; 2 Jur NS 83
(3) 3 Mer. 53.
(4) 2 B. & P. 238.
(5) 5 My. & Cr. 167.
(6) 5 B. & Ad. 58.

character the striking out a part afterwards might perhaps not have vitiated the rest.

The authorities do not justify the argument relied on for the Appellant. In *Ogilvie* v. *Foljambe* (1), each note that passed between the parties began with the name of the writer, which very form constituted a perfect signature; it governed the whole instrument, and operated upon every part of it. But in *Stokes* v. *Moore* (2), the name was introduced as it is here, and that was held not to constitute a signature within the meaning of the statute, for a referential signature is not sufficient. As to the *Statute of Limitations*, a rule has been laid down that the name must not be introduced as if in recital, that it must govern and authenticate the instrument, otherwise it will not be held sufficient; the same rule has been applied to a promise made under the 6 Geo. 4, c. 16, s. 131, *Lobb* v. *Stanley* (3), and must be applied here. *Propert* v. *Parker* is another instance of the same sort (4). Now that is the very thing that is wanting here, for here the name does not govern the whole of the instrument, does not authenticate it, and only relates as if by way of reference, and not of agreement, to the particular sentence in which it is introduced. In *Hammersley* v. *De Biel* (5) the authority to the two sons to treat was established, and then the proposals were distinctly made by the sons in the name of the father, his name beginning and governing each paragraph of the proposals, and those proposals were afterwards accepted and acted on. One of those proposals was the settlement by the intended husband on the intended wife of an income of £500 a year. That was done, and was in law a good consideration for the agreement, and a part performance of it, and was so treated by Lord *Cottenham* when *De Biel* v. *Hammersley* was before him in Chancery (6). And such he explained, in *Lassence* v. *Tierney* (7), to have been the meaning of what has been quoted from his judgment in the Court of Chancery. Of course in such a case the doctrine as to a representation made by one person, in order to influence the conduct of another, and after-

(1) 3 Mer. 53.

(2) 1 Cox, 219.

(3) 5 Q. B. 574.

(4) 1 Russ. & My. 625.

(5) 12 Cl. & F. 45.

(6) Ibid. 62, 63, n.

(7) 1 Mac. & G. 551, 571; 2 H. & T. 115, 134.

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wards acted on by that other, applied, but it has no application here, for the very first circumstances on which it must rest, the existence of a proper contract and the signature to it, do not exist.

The letter of Mr. *Emmet* was itself a proof of his belief that there was no contract, for if any had existed the Appellant would not have been, as he described, entirely at the mercy of the caprice of Mr. *Caton*. In truth, there was no contract, but only a promise, for the performance of which the Appellant relied on Mr. *Caton's* honour. The case, therefore, comes within the rule of *Maunsell* v. *White* (1), where a promise of that kind was held not to constitute a contract, and consequently not to be enforceable in equity. And as to misrepresentation, the existence of which, in fact, is denied here, it was expressly laid down in *Jorden* v. *Money* (2), that to raise an equity in such a case, there must be a misrepresentation of existing facts, and not of mere intention. The form here was the same as in *Glengall* v. *Barnard* (3), and that was held not to constitute a contract, a holding afterwards confirmed in this House (4). And in *Warden* v. *Jones* (5), an ante-nuptial contract, entered into by parol, to make a settlement on the wife, was executed after the marriage, but not being itself a valid contract within the *Statute of Frauds*, the execution of it was held inoperative against creditors. *Mundy* v. *Jolliffe* (6) is not an authority for the Appellant, for there the tenant had himself partly performed the matters mentioned in the memorandum, and in virtue of that part performance by him he was held entitled to claim performance from the landlord.

Sir *R. Palmer* replied, and mentioned the cases of *Ridgway* v. *Wharton* (7); *Shippey* v. *Derrison* (8). The case of *Goss* v. *Lord Nugent* (9), would have had exactly an opposite result in equity.

May 20. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, upon the argument of this appeal the counsel for the Appellant abandoned the ground on which her case was placed in the Court below, and raised a question which had not been previously considered, or, at all events, was not decided by the decree appealed from.

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(1) 4 H. L. C. 1039.

(2) 5 Ibid. 185.

(3) 1 Keen, 769, 776.

(4) Nom. *Thynne* v. *Glengall*, 2 H. L. C. 131.

(5) 23 Beav. 487; 3 Jur. N.S. 456, aff'd

(6) 5 My. & Cr. 167. 5 De G. M. & G. 744; 4 Jur. N.S. 26.

(7) 6 H. L. C. 238.

(8) 5 Esp. 190.

(9) 5 B. & Ad. 58.

The case for the Plaintiff, at the hearing before Vice-Chancellor *Stuart*, was founded upon the parol agreement of Mr. *Caton*, that if the Plaintiff would forego the execution of any deed of settlement he would leave to her by will the whole of her then and after-acquired property, and the house in *Seymour Place*, and the furniture and effects which should be in his residence at the time of his decease; which agreement it was contended had been in part performed by the subsequent execution of a will by Mr. *Caton* in accordance with his promise. The Vice-Chancellor adopted this view, and said :—" I am at a loss to know what act of part performance of an agreement to leave a certain provision by will, could be more complete than the execution of a will conformably to that contract. In fact it is, so far, more than a part performance, it is a complete performance." And upon the fact, which appears in the case, of the subsequent revocation of the will by Mr. *Caton*, the Vice-Chancellor considered that the case was brought within a class of cases in which, to use his words, " the Court has had to consider whether, where a testator has intended to leave by will a sum of money to a particular person, and his executor has undertaken, without its being left by will, to make good to the legatee the intended legacy, and the testator has therefore forborne to execute a will, the Court should, notwithstanding the provisions of the *Statute of Frauds*, and in order to prevent a fraud, interfere, and give to the legatee who was not named in the will, that which the executor had promised the testator should be given to him out of his estate after his death, just as much as if it had been given by will."

These were the grounds upon which the decree of the Vice-Chancellor in favour of the Plaintiff proceeded. Upon appeal to the Lord Chancellor, he does not appear to have thought that there were any other than these questions to be decided by him; and, after fully considering them, he reversed the decree of the Vice-Chancellor.

If the same questions had been raised on the argument upon this appeal, I should have had no difficulty in agreeing with the judgment of my noble and learned friend (Lord *Cranworth*), but the counsel for the Appellant distinctly declined to argue the case upon the footing of part performance of the parol agreement, and had thus rendered it unnecessary for me to state any reasons in support of the decree appealed from.

The question which your Lordships are now called upon to determine is, whether the memorandum in the handwriting of Mr. *Caton* which was delivered to Mr. *Emmet* as instructions for the preparation of the marriage settlement, is such an agreement in writing, or memorandum, or note thereof, signed by the party to be charged therewith, within the fourth section of the *Statute of Frauds,* as to amount to a marriage contract which the Appellant is entitled to have established by the decree of the Court, according to the prayer of her bill.

The Respondents deny that this memorandum is a sufficient agreement within the statute, and contend that, even if it is, it was waived and abandoned by the mutual consent of the parties.

There are very few facts necessary to be adverted to in considering these questions. In the autumn of 1852, the Appellant having accepted the offer of marriage made to her by Mr. *Caton*, and the parties having arranged between themselves certain terms for the marriage settlement, on the 29th of December, 1852, they went together to the offices of Mr. *Emmet*, the solicitor and friend of the Appellant. Mr. *Emmet's* account of that interview is in these terms:—After stating that, on the 29th of December, Mr. *Caton*, "accompanied by the Plaintiff, called on me at my offices, when he also informed me of the intended marriage, and stated that he had agreed with the Plaintiff that all the property of the Plaintiff, both present and future, should be settled upon her:" he goes on to say, Mr. *Caton* "also at the same interview, and in the presence and hearing of the Plaintiff, stated that he had himself prepared a memorandum of the terms of the marriage settlement, which had been mutually agreed to between them, and produced and handed over to me such memorandum, and instructed me to prepare a proper deed of settlement in accordance therewith." He afterwards says: "I, under the joint direction of the said *Richard Bewley Caton* and the Plaintiff, at once instructed counsel to settle a proper draft settlement, and for that purpose I laid before him the aforesaid memorandum, two of the clauses therein being, for the purpose of such instructions, struck through by the said *Richard Bewley Caton* himself, as they now appear." There is no evidence as to the exact time at which those clauses were struck out of the memorandum; but it appears from the evidence that the draft settlement having been prepared, was, on the 5th of January, 1853, sent by Mr. *Emmet* to the Appellant. Then on the following day, the 6th of January, she and Mr. *Caton* went to the offices of Mr. *Emmet,* and they both approved of the draft settlement. On the 7th of January, 1853, Mr. *Caton* wrote a letter to Mr. *Emmet,* desiring that certain property in *Dublin* belonging to the Appellant should be struck out of the settlement, and suggesting that a clause ought to be introduced providing for the payment of the interest and the rents and profits of that portion of the property which was to be settled upon her. On the 12th of January the parties agreed to waive, at all events, the execution of the deed of settlement. And upon that subject the evidence of Mrs. *Caton,* as well as of Mr. *Emmet,* is important. Mrs. *Caton* says that Mr. *Caton,* on the 11th of January, called and had an interview with her, and "represented to me that the engrossment of the settlement, and expense incident to its execution, would cost a good deal of money, and that he desired to avoid such expense altogether, and promised me that if I would forego the execution of any deed of settlement, he, the said *Richard Bewley Caton,* would most strictly and faithfully observe and carry out the terms of the said marriage contract so agreed upon between us as aforesaid, and would leave to me by his last will the whole of my then and after-acquired property (if any), and would also thereby give to me the said house, No. 75, *Seymour Place,* for my life, and all the household furniture, plate, linen, and china, and other effects which should be in his residence at the time of his decease, absolutely."

Mr. *Emmet* states that, on the 12th of January Mr. *Caton,* accompanied by the Plaintiff, had an interview with him at his offices, and Mr. *Caton* then stated to him "that, at his request, the Plaintiff had consented to abandon the settlement." I stop here; I do not put an interpretation upon these words which Mr. *Caton* used upon this occasion, which will be matter for subsequent con-

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sideration. But, in consequence of this, no deed of settlement was executed.

On the day of the marriage, the 7th of February, 1853, Mr. *Caton* made his will, and afterwards executed it in the vestry. He had shewn that will to Mrs. *Caton*, and it seemed to be in entire accordance with this promise. He died on the 24th of January, 1864, having left a will dated on the 4th of May, 1863, under which will the Appellant derived less benefit than he had proposed she should have. Under these circumstances, the Appellant now insists that the memorandum which served as instructions for the proposed marriage settlement is a binding marriage contract, the performance of which she is entitled to enforce.

It is unnecessary for me to trouble your Lordships with that memorandum, which is familiar to you. Supposing this to be an agreement, the first question to be considered is, whether it is signed by Mr. *Caton*, as required by the 4th section of the *Statute of Frauds*.

The cases upon this point cited in the course of the argument establish that the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of "authenticating the instrument," or "so as to govern the whole agreement," to use the words of Sir *William Grant*, in the case of *Ogilvie* v. *Foljambe* (1), or in the language of Mr. Justice *Coleridge*, in *Lobb* v. *Stanley* (2), "so as to govern what follows." Now I cannot think that the occurrence of Mr. *Caton's* name in the manner in which it appears can possibly be taken to govern the entire memorandum, although the whole of it is in his handwriting.

It was argued that the introductory words, "in the event of a marriage between the under-named parties," gave to the name of Mr. *Caton*, however afterwards appearing, the same force and effect as if he had written his own and Mrs. *Henley's* name at the beginning of the memorandum, instead of the words, "the under-named parties." But these words of reference cannot, in my opinion, have any effect upon the question. The name of the party, and its application to the whole of the instrument, can alone satisfy

(1) 3 Mer. 53.　(2) 5 Q. B. 574.

the requisites of a signature. In the memorandum in question, Mr. *Caton's* name is incidentally introduced with reference to a particular purpose, or as matter of description, and as this mention of his name would clearly be insufficient in itself, it cannot have any new effect given to it by the introductory words of the memorandum.

But, in my opinion, the memorandum did not amount to an agreement, and therefore it is immaterial whether it was signed or not. It was nothing more than, as it imports upon the face of it to be, instructions for a settlement. It contains the conditions agreed upon as the basis of a marriage settlement. That it was not intended as a final agreement appears from the alterations which were made by striking out clauses originally inserted in it. It was intended merely as proposals for a settlement, which were alterable at the pleasure of the parties, and were afterwards actually varied by the alterations made in the draft settlement.

But, assuming it to be an agreement, what was its nature? It was an agreement for a settlement; the words are: "In the event of a marriage between the under-named parties, the following conditions, as a basis for a marriage settlement, are mutually agreed upon. Mrs. *Henley* to have the whole of her fortune settled upon herself," &c. Now, supposing this agreement to have been properly signed, and not to have been performed, what would the Appellant's remedy have been? She might have enforced a specific performance, not of the mere execution of a deed, but of the terms of the settlement agreed upon. Supposing that to be the case, the agreement being of that nature was, in my opinion, most clearly waived and abandoned. Upon that subject a reference again to the affidavit of Mr. *Emmet* will be important. He says that, on the 12th of January, Mr. *Caton* "stated to me that, at his request, the Plaintiff had consented to abandon the settlement;" and then he goes on to say: "Meaning, as I well knew, from statements made to me by the Plaintiff and the said *Richard Bewley Caton*, in the presence of each other, the execution of any deed of settlement, upon his promise that, upon her so doing, he would leave to her, by his will, the whole of her then and after-acquired property, if any, intact, and would also give to her the premises No. 75, *Seymour Place*, for her life, and also the whole of his household furniture, plate, and other effects, absolutely and precisely the same as if the proposed deed of settlement had been executed."

Your Lordships will observe, therefore, that the endeavour of Mr. *Emmet* in this affidavit is to shew that the parties did not waive and abandon the settlement altogether, but that they merely consented that there should be no deed of settlement executed. And it is now contended that it was all along the purpose of the parties that this memorandum, which I have shewn your Lordships does not amount to an agreement, but merely contained proposals which were used as instructions for the marriage settlement, were in fact marriage articles, which were to continue in effect and to be enforceable, although no deed of settlement was actually executed.

Now, it appears to me that the whole conduct of the parties is at variance with any such understanding, and it is unaccountable, if this had really been the case, that it should never have been insisted upon down to the time of the hearing of the present appeal. But the best answer to such a case, brought forward at this last stage, is to be found in Mr. *Emmet's* warning letter to the Appellant of the 4th of February, 1853, and which has also a bearing upon the objection raised to the abandonment of the settlement, that it was obtained by fraud.

This letter of Mr. *Emmet* not only cautioned the Appellant that if she gave up the settlement she would be at Mr. *Caton's* mercy, but also pointed out to her so strongly the effect of relinquishing it, that it is impossible to say that her consent to give up her right to a settlement was obtained from her by contrivance, or that she was ignorant of the consequences which would result from it.

I will draw your Lordships' attention to one or two passages in that letter. Mr. *Emmet* says:—"It is, however, impossible for me to allow you to change your present state, and place yourself in a position by which you will be deprived of all your fortune, and left entirely at the mercy of another for your future existence, without once again raising my warning voice against such a very unjust proceeding." Then, after mentioning a case in which a lady would have been deprived of all her property if no settlement had been executed, he goes on to say:—"Now, I will suppose in your case that the will is duly executed at the time and place named, and that it is to the effect promised,—then suppose a quarrel, and the will is thrown into the fire, and another made, leaving you a paltry pittance, perhaps £100 a year; and remember too you will be in ignorance of the change until death shall have removed him far beyond the reach of all reproaches. What will you say then? And you incur the possibility of such an event taking place; when, if the gentleman is acting honourably, there cannot be the least objection to your having your fortune settled upon yourself in accordance with his promise to you and your promise to me?" This letter is wholly inconsistent with the idea that all that the Appellant consented to abandon was the mere form of the execution of the deed, and that the substance was to remain in the memorandum as marriage articles, enforceable at any time against Mr. *Caton* or his representatives. My Lords, even supposing that there had been a regularly signed agreement within the *Statute of Frauds*, I am of opinion that the agreement was waived and abandoned by the mutual consent of the parties, and therefore I advise your Lordships that the decree appealed from ought to be affirmed.

LORD WESTBURY:—

My Lords, my noble and learned friend who sits near me (Lord *Cranworth*) has requested me to address your Lordships before he does; I will therefore proceed to do so. The cardinal question in this case is the inquiry whether the document pleaded as a memorandum of agreement is sufficiently signed to satisfy the provisions of the *Statute of Frauds*. It has been very correctly said that that statute requires a signing and not a subscribing. Hence it has been deduced, and I think correctly, that if the signature be in itself a sufficient signature, it matters not in what part of the instrument it is to be found.

Now, what constitutes a sufficient signature has been described by different Judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of *Stokes* v. *Moore* (1), the language of the learned Judge is, that the signature

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(1) 1 Cox 219.

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must authenticate every part of the instrument. Or again, that it must give authenticity to every part of the instrument. Probably the phrases "authentic" and "authenticity" are not quite felicitous, but their meaning is plainly this, that the signature must be so placed as to shew that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. The language of Sir *William Grant* in *Ogilvie* v. *Foljambe* (1), is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must shew that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum.

My Lords, on looking at this memorandum you find that the name (or the initials of the name of Mr. *Caton*, which might be equivalent to the same thing), occurs four times, I think, in the document. In the first place it occurs in a parenthesis under the reference to trustees, "one to be named by Mrs. *H.*, the other by Mr. *Caton.*" Plainly there the signature has no other reference than to that portion of the memorandum which is contained within the parenthesis. In the next place it occurs where it says, "the interest on her fortune to be received and taken by the Reverend *R. B. C.*" There the signature has no other reference to any other part of the instrument than the antecedent words touching the receipt of the income of her fortune. Then a little lower down occur the words "the property of the Reverend *R. B. C.*" There the name is used in the genitive case, as indicating possession of the property previously spoken of, and its reference is limited to that property. Finally it occurs thus: "at her decease to go to the uses of Mr. *Caton's* will." There, again, it is used in the genitive case, and relates to the subject matter with which it is connected. In no place, therefore, is this signature found so situated as to have connection, or reference, or relation to or with anything more than particular portions of the instrument.

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(1) 3 Mer. 53.

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Now, an ingenious attempt was made at the bar to supply that defect by fastening on the antecedent words: "In the event of marriage the under-named parties;" and by the force of these words of reference to bring up the signature subsequently found and treat it as if it were found with the words of reference. My Lords, if we adopted that device we should entirely defeat the statute. You cannot by words of reference bring up a signature and give it a signification and effect different from that which the signature has in the original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or a memorandum signed by a party, another document which is specifically referred to by the terms of the memorandum so signed, and which by virtue of that reference is incorporated into the body of the memorandum. There you do not alter the signature; but you apply the signature not only to the thing originally given, but also to that which, by force of the reference, is, by the very context of the original, made a part of the original memorandum. But here you would be taking a signature intended only to have a limited and particular effect, and, by force of the reference to a part of that document, you would be making it applicable to the whole of the document to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply. Independently, therefore, of the general principle of not frittering away the requirement of the statute, which, in some respects, I might be of opinion has been done with rather too much freedom, and taking the doctrine in the strict sense in which it has been laid down by Sir *William Grant*, and also by the Judges of the Exchequer in equity, in deciding the case of *Stokes* v. *Moore* (1), and many others which have subsequently followed, there cannot, I think, be brought forward any well-founded argument to justify your holding that this memorandum is sufficiently signed to comply with the statute.

My Lords, this point appears scarcely to have been made in the Court below. I regret very much that a case should be brought at your Lordships' bar, and argued here on grounds that were not presented to the Court below. It is not only unfair to the Court

(1) 1 Cox, 219.

below, but it has a tendency to give to the Court of Appeal the character of an original jurisdiction, instead of its being confined to the exercise of an appellate jurisdiction. New arguments, undoubtedly, may be presented; but in ordinary fairness a point not brought forward in the Court below ought not to be made the ground of appeal.

My Lords, this is a case in which I have come to this conclusion with reluctance, because I cannot but regard it as a case of some hardship. I desire to give no opinion on the other points in this case. If this had been a memorandum of agreement, signed so as to satisfy the statute, I should have had no difficulty in holding that it was intended as a binding agreement, because the words in the introductory clause are "conditions mutually agreed upon." If it had been such as to satisfy the statute I should have hesitated very much before I could have brought myself to hold that it was effectually revoked and given up by the party in dependence upon a promise that has not been fulfilled. But it is unnecessary to discuss that, because the first point is one which I think your Lordships will agree in accepting as a sufficient ground of decision in this case; and if it be a sufficient ground it supersedes the necessity of considering the other.

My Lords, I would only add that I entirely concur with my noble and learned friend, the Lord Chancellor, in overruling the grounds on which the Vice-Chancellor's judgment appears to have proceeded. There is no analogy between the case presented here and the case of an executor promising a testator that if a legacy be not inserted in the will he will pay the money. That is a case of personal liability incurred by the executor. But here the attempt is to follow the property, and to make it subject to an agreement which has no reality. If that could be done, the *Statute of Frauds,* imposing the necessity of an agreement signed by the parties, would be readily and effectually superseded.

My Lords, I agree entirely in the ground upon which my noble and learned friend rested his judgment in the Court below; and with regard to the additional ground which has been brought forward here for the first time (and as to which I should have been sorry if it had not been considered by your Lordships, so that the parties may be satisfied that every point in the case has received

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due attention), I think that, notwithstanding the ingenuity with which the argument has been presented at the bar, there is no foundation here for contending that there ever was a binding agreement such as to satisfy the *Statute of Frauds*, and that being so, I think it will be your Lordships' duty to dismiss this appeal.

Whether your Lordships will, under the circumstances, deem it right to dismiss it with costs, I must leave entirely to your judgment, expressing only my own, that having regard to the fact that the whole of this lady's fortune has found its way into the possession of her husband, where clearly, according to the moral agreement of the parties, it was not intended to remain, I should be more satisfied if, without injury to the general rule which clearly ought to be abided by in all cases, namely, that costs follow the event, you could find it right to dismiss this appeal without costs.

LORD COLONSAY:—

My Lords, I have had occasion to consider this statute so much less frequently than your Lordships have done, that it is with some distrust of my own judgment that I entered on its consideration, and have endeavoured to satisfy myself as to its interpretation. I think it is very plain, looking to the cases which have been decided, and to the meaning of the statute, that it is not necessary that the signature of the party should be placed in any particular position upon the paper, whether it is subscribed or superscribed, or otherwise placed so as to shew that it was, in the language of Sir *William Grant*, intended to govern the matter that is contained in the document. But in this particular case the great difficulty that I have felt has been that, although the name of the party, written by himself, is to be found in reference to particular provisions where it occurs, in places which, taken together, seem to go very nearly to exhaust all the several provisions which the document contains, yet I think it did not exhaust all the several considerations that the parties had in view. I think it is plain from what followed, and from the use that is made of that document, that there were other considerations which the parties had in view which this document did not give effect to; and therefore I get out of the difficulty which embarrassed me when I considered the several clauses to which signatures were appended, and I have come to the conclusion which has been expressed by both my noble and learned friends, that this document is not one that satisfies the provisions of the statute.

I must say, in reference to the other parts of the case, that I am inclined to think that this document was not only one that did not satisfy the provisions of the statute, but that it was one which the parties never regarded as satisfying the provisions of the statute. I think it was never so treated. I think it is plain that the matters that were set forth here were regarded only as the basis of a settlement, and that they were discussed and considered, and that variations were made according to the views of the parties, and then I think it is probable that when they applied themselves to the consideration of all the various matters, they came to the conclusion that it would be better to have no settlement at all,—that is, not to follow up the purpose for which the memorandum was made. That appears to me to be the fair result of the whole case. I think that was clearly the opinion of Mr. *Emmet*. I think that letter of his of February the 4th is quite inconsistent with any other view being entertained by the parties at the time. Looking at what passed at the time, that part of the case also leads me to the same conclusion at which I have arrived with reference to the document itself. Therefore, I think the judgment that is proposed by my noble and learned friend is the correct one.

LORD CRANWORTH:—

My Lords, I am well satisfied to take no part in the discussion of this appeal from a decision of my own; but, having heard the whole of the argument, and endeavoured to listen to it with a perfectly impartial mind, I confess that nothing that has been urged (however ably it has been urged at the bar) has at all shaken me in the conclusion at which I arrived in the Court below. It is said that the precise point which has been relied on by the Appellant here was not argued below, and I believe it was not; but I should be sorry to pledge myself to that, because, as some time has elapsed since that argument, the matter has gone out of my mind. But if this point had been argued, I think it would have been entirely in vain. Without going into the grounds of my opinion, 1867 CATON v. CATON.

I will only say that on all points I think the Appellant has failed. I should be very sorry to hold that we are to fritter away the *Statute of Frauds*, as I think we should do by holding that this is a signature. It seems to me very unlike a signature. But if it was a signature, to what was it a signature? I think that the parties clearly meant that that paper should only be considered a paper containing some directions to Mr. *Emmet*, to enable him from them to frame a settlement, and that the matter remained all *in fieri*. I think that is clear, from the evidence of Mr. *Emmet*, which has been already adverted to. I have only to state farther, that I concur in the feeling which has been expressed by my noble and learned friends with respect to this case. I expressed somewhat the same feeling at the hearing below. I wished that I could have given this lady some relief, because I think she has been hardly dealt with; but I did not see my way to do so. Even now, I should be glad to see my way to any mitigation in the shape of costs; but I do not see any reason for departing from the ordinary rule here.

Decree or order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 20th May, 1867.

Solicitors for the Appellant: *Emmets & Son.*
Solicitor for the Respondent: *T. H. Dixon.*

EDWARD H. COOPER . . . . APPELLANT;

AND

WILLIAM PHIBBS, CHARLOTTE S. COOPER, AND OTHERS . . . . . . RESPONDENTS.

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May 9, 10, 31.

Agreement—Mistake—Pleading—Practice.

Where a Cause Petition (in *Ireland*) in seeking the cancellation of an agreement for the hiring of property, sets forth facts which go to establish a title to the property itself, and the answering affidavits do not deny these facts, but set up a title in the Defendants to the property, the Court may, under the general prayer for relief, make a declaration as to the Plaintiff's title to the property.

Where two parties, under a mistake of fact, enter into an agreement, either of them has a title to come to equity to be relieved from it. That relief will be given on the principles of good conscience alone.

A. was in expectation of succeeding to estates then in the possession of his elder unmarried brother. That brother purchased a fishery, which was duly conveyed to him; he afterwards became lunatic, and *A.* was appointed his committee. *A.* had two sons, *B.* and *C.* On *B.*'s marriage, in 1827, a settlement was executed, to which *A.*, *B.*, and *C.* were all parties, and it contained a covenant on the part of *A.*, that if he should succeed to the lunatic's estates of inheritance and hereditaments, he would convey them to trustees for himself for life, then to *B.* and his heirs male in strict settlement, remainder to *C.* and his heirs male in strict settlement. Similar covenants were entered into by *B.* and *C.* *A.* died. The only children of *B.*'s marriage were daughters. *B.* acted, as his father had done, as the committee of the lunatic, and in that character introduced into Parliament a bill to enable the lunatic to make cuts and canals for the improvement of the fishery. While the bill was passing through Parliament the lunatic died, and all his estates, the fishery included, were taken possession of by *B.*, who, having got the Act passed, made the cuts and canals under its authority. The Act recited the settlement of 1827, and that the fishery had been the property of the lunatic, but was by his death vested in *B.* On the death of *B.* (his brother *C.* being already dead) *C.*'s eldest son entered into possession of the estates, but believing (as he had always heard) that the fishery was the property of *B.*, he agreed to take it on a rent from *B.*'s daughters. He soon afterwards read the private Act, and then, believing that under the deed of 1827 and the provisions of the Act, the fishery really belonged to himself, he filed a Cause Petition in the Court of Chancery in *Ireland*, stating the facts, and praying that the agreement might be ordered to be delivered up, and for such other relief as "the nature of the case would admit of, and to the Court might seem fit." The answer of the daughters claimed the fishery as *B.*'s property under the Act:—

Held, that the fishery was the property of *C.*'s eldest son, under the provisions of the deed of 1827, which were not modified in any way by the Act:

4 Ch 585
6 HL 22
9 Ch 744
10 CB 33
20 Eq 70
705
3 Ch D 35
791
7 Ch D
13 Ch D 5
14 Ch D 83

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Held, also, that the agreement having been made in mutual mistake, the Plaintiff, though there was no fraud, was entitled to have it set aside:

Held, also, that under this form of proceeding, the whole facts fully appearing on the face of the petition and answering affidavits, the Court was authorized not only to set aside the agreement, but to declare the Plaintiff's title to the fishery.

Per LORD WESTBURY:—In the maxim "*Ignorantia juris haud excusat*," the word "*jus*" has the sense of *general law*, ~~or of private right according to circumstance~~s. In the sense of private right the maxim has no application to it.

Special directions were given as to the expenditure made by *B.* on the fishery improvement, and also for the purpose of adding fresh parties to the suit, so as to make a final determination of the cause.

THIS was an appeal against a decretal order of the Lord Chancellor of *Ireland*, dated 14th of June, 1865, and made under the following circumstances:—

By deed of the 12th of May, 1806, Sir *Edward Crofton*, for the considerations therein mentioned, conveyed the lands of *Ballysadare*, in the county of *Sligo*, with tolls and customs of markets, &c., and the salmon fishery, and all other the fisheries of the river of *Ballysadare*, situate in the same county, to *Joshua Edward Cooper* in fee.

Shortly after this conveyance had been executed *Joshua Edward Cooper* (who was unmarried) was declared a lunatic, and *Edward Synge Cooper*, his only brother, and his presumptive heir, was appointed committee of his estates. His estate in the county of *Sligo* was called the *Markree* estate. *Edward Synge Cooper* had two sons, *Edward Joshua Cooper* and *Richard Wordsworth Cooper*, *Edward Joshua* had been once married, but had no child by that marriage. On the 13th of February, 1827, a deed of settlement was executed on his intended marriage with Miss *Wynne*, and to that settlement his father, *Edward Synge Cooper*, and his brother, *Richard Wordsworth Cooper*, became parties. Under that settlement *Edward Synge Cooper* covenanted that if the lunatic should die intestate and without issue, and should be at the time of his death seised in fee "of or in the said several towns, lands, tenements, or hereditaments in the county of *Sligo*," &c., "thereinbefore and thereinafter particularly enumerated and described;" or if at any time after the decease of the lunatic he, *Edward Synge Cooper*, should happen to be seised of any freehold estate "in the said several last-mentioned lands, tenements, and hereditaments, by any title derived by, through, or under" the lunatic, he, *Edward Synge Cooper*, would, within six months after the lunatic's death, convey to trustees "all that and those the town and lands of *Ballysadare*, and all the tenements, houses, and plots therein, together with the tolls and customs of the fairs and markets therein . . . and all other estates of inheritance whereof the said [lunatic] shall die seised or possessed, or such, and so many, and all such parts of the same as shall have descended, remained, or vested in the said *Edward Synge Cooper* as tenant in fee simple or fee tail in possession thereof, in any of the manners or ways aforesaid, together with their several sub-denominations and appurtenances, and also all houses, wastes, common, common of pasture, waters, watercourses, easement, liberties, privileges, profits, appurtenances," &c., &c., to himself for life, remainder to his son *Edward Joshua* for life, remainder to his issue male in strict settlement, remainder to his other son, *Richard Wordsworth Cooper*, for life, remainder to his issue male in strict settlement. The word "fishery" did not occur in the settlement. There was a similar covenant on the part of *Edward Joshua Cooper* and of *Richard Wordsworth Cooper* that if the said estate should descend to or vest in them, or either of them, from the lunatic, they or either of them would convey the same to the uses specified in the covenant of their father, *Edward Synge Cooper*. In August, 1830, *Edward Synge Cooper* died, leaving his elder brother, the lunatic, and his own two sons, *Edward Joshua* and *Richard Wordsworth*, him surviving. *Edward Joshua* from that time acted as committee of the lunatic. In the early part of 1837 a petition for a bill had been presented to Parliament, by *Edward Joshua* as committee, to give the lunatic powers to improve the fishery; but while it was passing through Parliament the lunatic died, and then in the various clauses the necessary changes were made by introducing the name of *Edward Joshua*, who had succeeded to the property. The Act, which was known as the 1 Vict. c. lxxxix., recited that the "rivers *Arrow* and *Owenmore* rise from two large lakes in different parts of the county of *Sligo*, and, after flowing through a large tract of country, unite their streams at about a mile above the town of *Ballysadare*, whence they flow into the same channel to the bay of *Ballysadare*, where, by one mouth, they discharge their waters into the bay," and then it described how the flow of their waters was interrupted by ledges of rocks, which prevented salmon getting up the river; and it recited the conveyance by Sir *Edward Crofton* to the lunatic, "and his heirs and assigns for ever," of the whole eastern bank of the river, "together with the salmon fishery, and all other the fisheries of the river," possessed by Sir *Edward Crofton;* that the lunatic after the conveyance, and up to the time of his death, "did uninterruptedly exercise and enjoy the exclusive right of taking the salmon which so as aforesaid annually congregate within the mouth of the said united rivers:" that the lunatic died in June, 1837, "whereby all the aforesaid estates, towns, lands, and fishery, have descended to, and are now vested in, the said *Edward Joshua Cooper*, who is the nephew and heir-at-law of" the lunatic: that "the said *Edward Joshua Cooper* is desirous of constructing canals or water cuts at his own expense" in consideration of the exclusive right of fishery being vested in him, his heirs, and assigns, and it was therefore enacted that the powers to make the cuts and canals, &c., should be granted to him, provided that the cuts "shall be altogether situated on the estate and property of the said *Edward Joshua Cooper*," &c. There were various other provisions, in all of which *Edward Joshua Cooper* was spoken of as the owner of the estate, and the title of the Act, as altered after the death of the lunatic, was, "An Act to enable *Edward Joshua Cooper*, Esq., to establish and protect a Salmon Fishery upon the Lakes and Rivers of *Owenmore* and *Arrow*, and also within the Bay of *Ballysadare*, in the County of *Sligo*."

Edward Joshua Cooper constructed the canals and cuts, and improved the salmon fishery, as provided for by this Act, and he continued in possession thereof, and of the estates to which he had succeeded, until his death.

By his second marriage he had five daughters but no son.

Richard Wordsworth Cooper had also married, and he died in 1850, leaving the Appellant his eldest son and heir-at-law.

In 1858 the Appellant married, and on the 8th of August, 1858, a disentailing deed, and then a settlement, of the *Sligo* estates, were executed by *Edward Joshua Cooper*, the estates being settled as subject to the uses of the settlement of 1827.

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During the life of *Edward Joshua Cooper* he, apparently believing that the Act 1 Vict. c. lxxxix., vested the fee simple of the fishery in him, discharged from the limitations of the settlement of 1827, always spoke of himself as the absolute owner of the fishery, and, as alleged in the Cause Petition of the Appellant, always assumed such to be the fact.

In September, 1858, the Appellant joined with *Edward Joshua Cooper* in a lease, renewable for ever, of two and a half acres of land adjoining the fishery, which lease was granted to a Mr. *Leech*, as trustee for *Edward Joshua Cooper*, who afterwards built on this land a messuage known as the *Rapids Cottage*, with a coach-house, and other premises.

In April, 1863, *Edward Joshua Cooper* died intestate, leaving his five daughters (but no male issue) him surviving. On his death the Appellant entered into possession of the estates, and on the 14th of October, 1863, there was executed between him and *Phibbs*, who, under the settlement upon *Edward Joshua's* second marriage, acted as trustee for the daughters, an agreement for a lease, which the Appellant now sought to cancel. It was in the following terms: "*W. Phibbs* agrees to let, and Colonel *Edward Cooper* agrees to take, for a term of three years, to be computed from the 1st day of November next, the salmon fishery at *Ballysadare*, county *Sligo*, together with the *Rapids Cottage*, coach-house, and gate-house, at the yearly rent of £550 sterling, said rent to be payable half yearly, on every 1st day of May and 1st day of November in each year. The said *Edward Cooper* shall, during the tenancy, keep proper books, showing the receipts and expenditure of said fishery, and weights in pounds of number of fish taken," and shall allow *Phibbs* to inspect the books, and to have free access to the fishery.

Before the first half year's payment became due, the Appellant purchased and read the Act of Parliament, 1 Vict. c. lxxxix., and then, believing that it had not the effect which had always been attributed to it, he filed his Cause Petition, in the Court of Chancery in *Ireland*, to have the agreement set aside. To this Cause Petition Mr. *Phibbs*, and the five daughters of *Edward Joshua Cooper*, were made Defendants, and the prayer was, that the agreement of the 14th of October, 1863, might be delivered up to be cancelled, and the

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Defendant, Mr. *Phibbs*, perpetually restrained from suing upon the same, the Petitioner submitting to any terms which the Court might impose as the condition for granting the said relief, and (after naming the Defendants) asking for such farther relief as "the nature of the case would admit of, and as to the Court might seem fit."

Affidavits in answer were put in, and witnesses examined, and the cause was heard before the Lord Chancellor of *Ireland*, who, on the 14th of June, 1865, made a decretal order dismissing the Petition with costs, but without prejudice to any question as to the ultimate right to the fishery (1).

The *Attorney-General* (Sir *John Rolt*), and Mr. *G. M. Giffard*, Q.C. (Mr. *FetherstonH.* was with them), for the Appellant:—

The decree of the Court below is wrong in substance and in form. The agreement ought to have been set aside, as made under a mistake of fact, and the title of the Appellant to the fishery ought to have been declared.

The argument on the other side is, that this fishery was only created by the Act of Parliament, and so could not have been affected by the deed of 1827. But the deed itself, and the evidence in the cause, shew that the fishery had always existed, and was part of the property conveyed by the deed of Sir *E. Crofton*, in 1806, to the lunatic. As such, it came into the possession of *Edward Joshua Cooper*. All that was required of Parliament, when the Act was applied for, was power to do that which should remove obstacles to the fishery becoming as profitable a fishery as it might. The nature of the fishery, and the title to it, were not affected by that Act, which spoke generally of the fishery as being vested in *Edward Joshua Cooper*, but which did not pretend to say how it was so vested, or how it was to descend after his death. There is no word or phrase in the Act which restrains the title to his children, and the general words of the Act will be satisfied by construing them with the limitations in the deed of 1827. So construed, the Appellant is entitled to the fishery. The grandfather of the Appellant and of the Respondents, and their respective fathers, were parties to the deed of 1827, and its covenants are binding on them all. Under such circumstances as exist here, the Appellant is, by the settled doctrines of equity, entitled to relief: *Bingham* v. *Bingham* (1).

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(1) 17 Ir. Ch. Rep. 73. In the course of his judgment the Lord Chancellor said: "The object of this Cause Petition is to relieve *Edward Henry Cooper* from the consequences of an act done by him while in ignorance of his true position with respect to this fishery, done by him in derogation of his rights while acting under the influence of a mistake. . . . . No doubt, a mistake in point of law may be corrected both in this Court and in a Court of law. This is now perhaps sufficiently established, though it was for some time a subject of controversy in Courts of law," but his Lordship remarked that this power of correction would not be exercised except where equity and good conscience required it, and his Lordship finally came to the conclusion, that no valid ground for relief was established in this case.

The form of the Cause Petition justifies the Appellant in seeking for this general relief. Though he does not specifically ask that his title to the fishery may be declared, he shews what that title is, and he asks that the agreement made in ignorance of that title may be set aside, and that he may have "such farther and other relief as the nature of the case will admit of, and as to your Lordship shall seem fit." That would justify the declaration of his title by the Court, the more especially as the Respondents, in their answering affidavits, set up a claim to the fishery for themselves, and so raise the very question of title for decision by the Court. If, however, the prayer of the Cause Petition was not deemed sufficient to warrant the Court in declaring the title of the Appellant. then the Court ought to have directed the Petition to be amended, or, if necessary, a bill to be filed, such a course being expressly provided for by the 3rd section of the statute 13 & 14 Vict. c. 89, which regulates the proceedings in the Court of Chancery in *Ireland*. But it is not necessary to amend the statements in the Cause Petition, for, if there is any deficiency in its statements, the facts disclosed in the answer supply that deficiency, and are those on which the Plaintiff may rely in support of his case: *Attwood* v. ——— (2). Nor is it necessary, in order to obtain this declaration of title, that other parties should be brought before the Court, for all that is sufficient for this suit is stated on the face of the Petition, or set up in the answer, and the rights of these contesting parties may, therefore, be declared: *Wedderburn* v. *Wedderburn* (3).

After the deed of 1827, *Edward Joshua Cooper* stood in the character of a trustee to his nephew, and even if it can be said

(1) 1 Ves. Sen. 127. (2) 1 Russ. 353. (3) 2 Keen, 722; 4 My. & Cr. 41.

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that he purchased any rights of fishery, he could only purchase them as a graft on the trust: *Keech* v. *Sandford* (1).

Mr. *Lawson*, Q.C. and Mr Robert Griffin (of the Irish Bar), and Sir *Roundell Palmer*, Q.C., for the Respondents:—

The judgment of the Court below was right in refusing to set aside the agreement, and it was also right in not declaring the right of the Petitioner to the fishery. As to the latter, there had been no prayer; the Petition set forth no facts to justify it. The 14th paragraph of that Petition limited to one point the relief sought for. Speaking of the agreement, it goes on to say, "for the cancellation or rescission of which this suit has been instituted," the Court cannot go beyond the object of the Cause Petition, thus specifically declared. If the agreement was not to be rescinded, then the whole suit was properly dismissed.

The mistake (if it is really a mistake at all), in respect of which the agreement was asked to be set aside, is a mistake in a matter of law. That is not a good ground for relief, unless the Court should see clearly that the mistake was occasioned by fraud and misrepresentation. The Appellant's only ground for applying to the Court is, that he did not buy a copy of the private Act until after he had signed the agreement. That, surely, is no ground for the interference of a Court of equity; or, if he puts his case on the settlement of 1827, he can have no right founded on his neglect to know what that provided. There is no allegation by him that the Respondents pretended to have acquired the fishery by virtue of the Act of Parliament, or that there was any fraud or misrepresentation by which he was misled.

The covenant in the deed is limited to the things therein enumerated, and the fishery is not once mentioned. Now, so far as the lands are concerned, the covenant has been fulfilled; there is, therefore, no pretence to come to Chancery to ask that something new may be added to the covenant. [LORD WESTBURY:—The words are "and all other hereditaments &c., that the said" (lunatic) "shall die possessed of;" compare that with the Act of Parliament.] That might by inference include a fishery; but the question whether it would do so is doubtful. That question cannot be raised in a suit like the present.

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(1) Sel. Cas. in Chy. 61; 1 Wh. & Tu. Lead Cas. 39, and notes.

The claim here by the Appellant is in respect of the river fishery. But the 12th section of the Act, which defines the Bay of *Ballysadare*, shews that sea fishery alone is there spoken of. Any other fishery was to be acquired, and others were acquired by purchase by *Edward Joshua Cooper* from other proprietors. He purchased with his own money, and for his own advantage. The Act says nothing about a trust, but it does declare the fishery to be vested in *Edward Joshua Cooper*, his heirs and assigns, for ever. [LORD WESTBURY:—The Act puts all together, and declares that they shall constitute the fishery. If he was a trustee as to one part, was he not equally a trustee as to the other? How, then, are the parts to be distinguished?] In the Petition the Appellant does not set forth any trust, but speaks of himself as if he was the owner in fee, and claims relief from the agreement in that character. A trust cannot be created by mere implication. In *Acheson* v. *Fair* (1), Lord Chancellor *Sugden* says: "If a man having a fiduciary character in respect of certain lands, obtains a new interest, that will be bound by the old trusts; but in this case I am asked to go much farther, and to hold that what he takes besides the old interest, although in new lands, is bound by the trusts of this will, because the new lands are comprised in the same lease with the old lands. There is no such rule in equity. Is there any equity to follow what a trustee obtains in a property not subject to the trust." His Lordship there referred to, and considered, the cases of *Randall* v. *Russell* (2), and *Hardman* v. *Johnson* (3). [LORD WESTBURY:—Here there is a prayer for general relief.] That is merely adjunctive—it does not warrant a decision on the title to the fishery, which has never properly been put in issue. The Lord Chancellor, in his judgment, remarked strongly on the absence of any "positive statement of the existence of the rights, in reference to which it is said that Mr. *E. H. Cooper's* mistake was made." In no part is there anything beyond a statement of the supposed effect of the deed of 1827, "as your Petitioner is advised."

(1) 3 D. & War. 512, 524.
(2) 3 Mer. 190.
(3) 3 Mer. 347.

The Petition is not so framed as to entitle the Appellant to a declaration of his right to the fishery; and the provisions of the private Act of Parliament justify the argument that the fishery was vested in *Edward Joshua Cooper*. The words of the Act so declare it, and there is no mention whatever of the deed of 1827 restricting his right. In fact, he was treated throughout as the heir and successor of the lunatic, who is in the Act described as the person entitled in fee to the estate. No fraud was practised upon Parliament, and the bill underwent the examination usually made at that time by the Judges. The Act states the fact of *Edward Joshua's* title, and confirms it, and it gives him power to acquire the fishery, a power which he exercised for his own benefit. The parties to the deed of 1827 must be considered as having been intentionally omitted from its provisions. The money laid out under the Act was that of *Edward Joshua Cooper*, which, of course, he would not have expended if he had believed himself to have no more than a life estate in the fishery. The Appellant had, at the least, full as good means of knowledge as the Respondents had; he had, too, the benefit of legal advice, and he deliberately entered into this agreement. There is, therefore, no valid claim, on the score of equity and good conscience, which he can put forth in order to have it set aside. For though equity will relieve against a bargain made under a misconception of rights, it must be a misconception which favoured one party, and which the other had not the means of correcting. It was not so here. And in order to obtain the relief now sought, the mistake ought to be one of fact, and not of law: *Midland Railway of Ireland* v. *Johnson* (1), where Lord *Chelmsford* said (2): "The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be at law."

The Cause Petition, if any claim of title to the fishery is to be founded upon it, is defective in not bringing before the Court all the parties interested. Such an objection would be good upon demurrer: *Penny* v. *Watts* (3); and the same principle will prevent the Court giving a decision on this claim to the fishery, when absent parties might be prejudiced by it. In all respects the decree was correct.

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(1) 6 H. L. C. 798.

(2) Ibid. 811.

(3) 2 Phil. 149.

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The *Attorney-General* replied.

May 31. LORD CRANWORTH:—

My Lords, this is an appeal against a decree of the Lord Chancellor of *Ireland*, of the 14th of June, 1865, dismissing a Cause Petition which had been filed by the Appellant on the 9th of April, 1864, pursuant to the *Chancery Regulation Act* of 1850. The object of the Petition was to be relieved from an agreement, dated on the 14th of October, 1863, by which the Petitioner agreed to become tenant to the Respondent *Phibbs*, for three years, of the salmon fishery of *Ballysadare*, in the county of *Sligo*. The ground of the relief asked was, that the Petitioner had entered into an agreement in mistake as to his rights. He thought that the fishery belonged to the other Respondents, for whom *Phibbs* acted as trustee; but he was in truth himself the owner of the fishery as tenant thereof in tail.

It is necessary to state shortly the title. [His Lordship fully detailed the facts of the case.]

The mistake, as the Petitioner says, arose in this way. The *Ballysadare* property borders on, and is traversed by, the two rivers which I have mentioned—the *Arrow* and *Owenmore*—which unite about a mile above the town of *Ballysadare*, and so united fall into the estuary about a quarter of a mile below the town. The salmon were unable to get from the estuary up these rivers by reason of ledges of rock obstructing the free passage up the rivers. This prevented the fish from going up and depositing their spawn in the waters higher up. It was important for the owners of *Ballysadare* to get these obstacles removed, and it had been intended in the lifetime of the lunatic to obtain parliamentary powers enabling him to divert the course of the stream, or rather the united streams, or otherwise to prevent the effect of these obstructions; and a bill had been introduced for that purpose in the session of 1837, in the lifetime of the lunatic. But while that bill was before

Parliament the lunatic died, and the right to the fishery descended on *Edward Joshua*, his eldest nephew. The bill was then altered by reciting the death of *Joshua Edward*, and the powers intended to have been conferred on him were conferred upon *Edward Joshua*. The royal assent having been obtained to the bill, it became law on the 30th of June, 1837.

It is necessary very shortly to advert to the terms of that Act of Parliament. It begins by reciting, " Whereas the rivers *Arrow* and *Owenmore* rise from two large lakes in different parts of the county of *Sligo*, in *Ireland*, and after flowing through a very large tract of country, unite their streams at about a mile above the town of *Ballysadare*, in the said county, from whence they flow in the same channel to the bay of *Ballysadare*, where by one mouth they discharge their waters into the said bay of *Ballysadare* at a distance of about a furlong below the said town; a considerable portion of their course between the said town and the sea being interrupted by a series of ledges of rock, in passing over which their waters form a number of cascades or waterfalls: And whereas numbers of salmon yearly congregate within the said bay of *Ballysadare* and below the said waterfalls, near the said mouth of the said united rivers; but by reason of the said cascades or waterfalls they are prevented from ascending higher into the said rivers and into the lakes connected therewith, so as to deposit their spawn in a safe part of the same; some of them, however, at high spring tides ascending the lower fall, but are unable to ascend the continuing cascades or falls from the shallowness of the water preventing them from making their spring, and therefore they return again into the ocean." Then it recites that the rivers and waters in question " are well adapted to invite the spawning of fish therein, and to protect the breeding of salmon; but no salmon fishery has or could have heretofore existed in any part of said rivers above the said waterfalls for the cause aforesaid." Then it goes on to say, " And whereas a safe and commodious passage for the fish up the said rivers, for the purpose of depositing their spawn therein, might be effected by the construction of passages or water cuts on the eastern side of each of those places where, as aforesaid, the ledges of rock obstruct the channels of such rivers: And whereas Sir *Edward Crofton*, Baronet, by a certain deed executed by him, and bearing date the 12th day of May, in the year of our Lord 1806, granted and conveyed all his estate and interest in and to the said town and lands of *Knockmuldowney,* otherwise *Ballysadare,* aforesaid, comprising the entire eastern bank of the said river below the said town, together with the salmon fishery and all other the fisheries of the river commonly called the river of *Ballysadare,* unto *Joshua Edward Cooper*" (that is, the lunatic) "who was the uncle of the said *Edward Joshua Cooper,* and to his heirs and assigns for ever, of all which portion or part of the said town and lands of *Ballysadare,* and fishery, and rights of fisheries, the said *Joshua Edward Cooper* up to the time of his death continued seised in fee simple, together with a very large proportion of the lands through which the said rivers flow, particularly in, about, and between the towns of *Collooney* and *Ballysadare:* And whereas the said *Joshua Edward Cooper*" (that is, the lunatic) "did after the said conveyance, and to the time of his death, uninterruptedly exercise and enjoy the exclusive right of taking the salmon which so as aforesaid annually congregate within the mouth of the said united rivers, which after their union are called the river of *Ballysadare,* and also immediately below the waterfalls situate at *Ballysadare* aforesaid: And whereas the said *Joshua Edward Cooper* died, on or about the 8th day of June, 1837, intestate, whereby all the aforesaid estates, towns, lands, and fishery have descended to, and are now vested in, the said *Edward Joshua Cooper,* who is the nephew and heir-at-law of the said *Joshua Edward Cooper:* And whereas the said *Joshua Edward Cooper* is desirous of constructing the said canals or water cuts at his own expense, on the terms that the exclusive right of fishing for, and the protection of, salmon and other sea fish in the said rivers, lakes, and bay, shall in consideration thereof be vested in, and confirmed to, the said *Edward Joshua Cooper,* his heirs and assigns."

Then, after certain recitals, which are not important, it enacts, "That the said *Edward Joshua Cooper,* his heirs and assigns, shall be, and he and they are hereby fully authorized and empowered, at his and their own proper costs and expenses, and by his and their deputed agents, workmen, and servants, to divert and turn the waters of the said rivers, by making, completing, and maintaining two canals, passages, or cuts, one communicating with the said united rivers of *Arrow* and *Owenmore*, near the bridge of *Ballysadare*, and the other canal or cut communicating with the said river *Owenmore*, and extending forty-three perches from the upper fall at *Collooney*, to the foot of the lower fall, and running at the back or west side of the town of *Collooney*, in such manner as may be sufficient to effect the aforesaid object of enabling the said salmon to ascend into the said rivers and lakes: provided always, that in making and completing the said canal, passages, or cuts, the same shall be altogether situated on the estate and property of the said *Edward Joshua Cooper*, and that no trespass be in any manner committed on, or injury done to, the land of any other person or persons whomsoever." Then it is provided also that the waters should not be diverted from their former course in such a manner as to injure the mills; and then afterwards, by the third section, it enacts, "that it shall be lawful for *Edward Joshua Cooper*, his heirs or assigns, and he is authorized to purchase from any persons incapacitated," &c., "their rights of salmon fishery in the bay." I think it is unnecessary to advert particularly to any other part of the Act.

Now, *Edward Joshua Cooper* said, and probably truly said, that, under the powers of that Act, he laid out large sums of money in improving the bay, and had purchased up fishery rights in the bay, amounting to between twenty and thirty, all of which were conveyed to him in fee, and that the fishery was thus made very valuable. *Edward Joshua Cooper* considered that under this Act, and by the outlay he made, he became owner of the fishery in fee, and he so represented to the Appellant. He continued in possession till his death, which happened in April, 1863, and the question would then arise as to his title. If he was, as he supposed and represented himself to be, seised in fee for his own use and benefit, then, on his death, the right of the fishery descended on his five daughters, the now Respondents; but if the fishery, like the rest of the *Ballysadare* property, was subject to the covenants of the deed of 1827, then it passed to the Appellant.

The first question, therefore, is, "Did the deed of 1827 extend to and comprehend the fishery?" Now, the fishery was conveyed to the lunatic by a person of the name of *Crofton*, on the 12th of

May, 1806, with the town and lands of *Ballysadare.* It was there described thus: "All that and those the town and lands of *Knockmuldowney,* otherwise *Ballysadare,* together with the tolls and customs of the fairs and markets thereof, and the salmon fishery, and all other the fisheries of the river, commonly called the river of *Ballysadare,* or by what other name or names the said town, lands, and other premises, or any of them, is or are called." That is the description in the conveyance to *Joshua Edward,* the lunatic. That description, however, was not adopted in the description of the parcels as they were settled in 1827. The parcels are there merely described as the town of *Ballysadare,* otherwise *Knockmuldowney,* with certain appurtenances connected with it. But then it goes on to say that the covenant is to extend to "all other estates of inheritance whereof the said *Joshua Edward Cooper* shall die seised or possessed of, or so many of them as shall descend in the manner therein mentioned."

Although the description of the parcels does not in terms mention the fishery, yet, inasmuch as the fishery certainly was an hereditament of which *Joshua Edward* died seised in fee—and that is expressly stated in the Act of Parliament,—it seems perfectly clear that that deed must have extended to the fishery, under the general words, of "all other estates of inheritance and hereditaments." But the Court below, it appears, thought that the fishery was not intended to be included; and, my Lords, the first question that one would put upon that is, why they should say that it was not intended to be included. It is certainly included in the general words; and I do not think your Lordships are at liberty to speculate as to the probability of what the parties intended to include, if they have used words which actually include it. That seems to be a conclusive answer to the suggestion. I must say, farther, that if we were at liberty to speculate, I think that anything less probable than that the parties could have intended to settle the lands, and not include the fishery, can hardly be imagined. It is to be recollected, that, at the time this deed was entered into, no such question as now arises could possibly have existed, from the fact that the settlor, *Edward Joshua,* had no male issue, or, indeed, any issue from his first marriage. He was then going to be married a second time, and it was just as probable that he should

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have male issue as that he should have female issue; therefore the improbability seems to me excessive, that they could have meant to settle the lands, and not to settle the fishery. I just make these remarks upon the question of probability. At the same time, that is not a matter upon which we are entitled to enter into any speculation, because it is quite clear that, under the general words, the fishery was included.

3 ChD 791,

The consequence was, that the present Appellant, when, after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own property—for, in truth, this fishery was bound by the covenant, and belonged to him, just as much as did the lands of *Ballysadare;* therefore, he says, I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it.

In support of that proposition he relied upon a case which was decided in the time of Lord *Hardwicke*, not by Lord *Hardwicke* himself, but by the then Master of the Rolls, *Bingham* v. *Bingham* (1), where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine; but even if it had not been, that will not at all shew that this Appellant is not entitled to this relief, because in this case the Appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the Respondents. It is stated by him in his Cause Petition, which is verified, and to which there is no contradiction, and in all probability it seems to be the truth, that his uncle told him, not intending to misrepresent anything, but being in fact in error, that he was entitled to this fishery as his own fee simple property; and the Appellant, his nephew, after his death acting on the belief of the truth of what his uncle had so told him, entered into the agreement in question. It appears to me, therefore, that it is impossible to say that he is not entitled to the relief which he asks, namely, to have the agreement delivered up and the rent repaid. That being so, he would be entitled to relief, but he is only entitled to this relief on certain terms, to which I will presently advert.

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(1) 1 Ves. Sen. 127.

Before I do so I must refer to an argument which was relied on very much by the Respondents, namely, that the fishery conveyed in 1806 by Sir *Edward Crofton* was not the fishery in the estuary, but only in the rivers, and that consequently the nephew, *Edward Joshua*, had no right whatever in that fishery under the descent from his uncle. I cannot think that there is any foundation for this suggestion, because the Act of Parliament expressly states that the fishery, in the estuary and at the mouths of the rivers, had descended from the lunatic uncle upon *Edward Joshua*. But even if it had been so, in my opinion it would not have made the least difference, for the right of fishing in rivers traversing the lands is an incident to the right of property, and that property certainly was governed by the covenant of 1827.

The argument on the part of the Respondents is, that the right to make the new cuts conferred by the Act was a new right, and that that new right was granted to *Edward Joshua* in fee. I do not think that that is a true construction of the Act, but if it was it would be a right which *Edward Joshua* obtained by virtue of his right to the lands and to the fishing in the fresh waters. As to that right he stood in a fiduciary relation to those interested under the deed of 1827. But for his right under that instrument he could not have obtained the powers conferred by the Act. In my opinion the very same doctrine that is acted upon so continually, that a tenant for life of a renewable property, if he renews it, cannot by possibility renew it for his own benefit, applies in principle to this case. If the facts had been such as the Respondents contend they were, namely, that he was the owner in fee simple under the Act of Parliament, and that the property was not governed by the covenants of 1827, still, even if it was not governed by those covenants, he stood in a fiduciary character, which disqualified him from making any such contention as that. Therefore, *quâcunque viâ*, it is clear to my mind that the Appellant is entitled to the relief he asks by getting rid of this agreement.

Then the next question is, what are the terms upon which this relief is to be given? Now, the Respondents allege that their father, *Edward Joshua*, in making the canals and other works necessary for establishing the fishery, and also in purchasing up fishery rights in the bay, expended very large sums of money.

First of all he was at the expense of obtaining the Act of Parliament. It was intended that the Act of Parliament should be passed in the lunatic's lifetime, but the lunatic having died, it was treated as being from the beginning *Edward Joshua's* expenditure. He was at great expense in purchasing up the rights of fishery of different proprietors on the banks, and he was at very large expense in making cuts and removing obstructions, so as to make the fishery available. That, at least, is the allegation of the Respondents. Now, if that is so, the question is, upon what terms ought this relief to be granted? It is impossible to decide the merits of this claim in the absence of the persons entitled to the *corpus* of the estate. On the marriage of the Appellant, in 1858, the property was settled to uses, and on trusts, for the benefit of the Appellant and his wife, and the issue of the marriage. The Appellant, therefore, has not brought before the Court all the persons interested in this question. If the Respondents succeed in establishing their lien, it will be a lien affecting the life interest of the Appellant, as well as the rest of the *corpus* of the property, and so justice would not be done to them if we were to give relief to the Appellant by simply setting aside the agreement on which they claim a lien. They have a right to have that question disposed of. I submit to your Lordships, therefore, that all that we can do is to remit the case to the Court of Chancery in *Ireland*, with declarations which shall enable the parties to have this question properly decided.

The declarations that I would suggest to your Lordships as the proper ones to be made, are these: To declare that the lands and hereditaments conveyed to *Joshua Edward Cooper* by the deeds of 1806 (including the fishery of *Ballysadare*), were comprised in the settlement of the 13th of February, 1827, and were bound by the covenant of *Edward Joshua Cooper* therein contained; and that at the time of the passing of the Act of Parliament of 1 Vict. c. 89, the said *Edward Joshua Cooper* was a trustee of the lands, hereditaments, and fishery of *Ballysadare*, for the persons entitled under the trusts of the aforesaid settlement of 1827, and that the rights, powers, and interests granted to the said *Edward Joshua Cooper*, his heirs and assigns, by the said Act of Parliament, must be deemed to have been taken by him as a trustee for the persons entitled under the settlement of 1827, including himself as tenant for life; and that all the estates, rights, and interests acquired by the said *Edward Joshua Cooper*, under and by virtue of such powers; and the canal and works made and constructed by him, by virtue of the said Act, were acquired, made, and held by him in like manner, in trust for himself and the other persons entitled under the said settlement of 1827. And farther declare: that the lands and fishery of *Ballysadare* were also comprised in the settlement of the 6th of August, 1858; and that under and by virtue of the said several settlements, the Appellant was, at the time of the making of the agreement of the 14th day of October, in 1863, in his Petition mentioned, entitled as tenant for life to the said lands and fishery of *Ballysadare*, including therein the rights and interests and works acquired and made by the said *Edward Joshua Cooper*, as aforesaid (save and except only the piece of land demised by the deed of the 27th of September, 1858, and the buildings thereon). That alludes to a lease that was granted by the Appellant, the details of which it is immaterial to allude to, for this question. And farther declare: that the aforesaid agreement of the 14th of October, 1863, in the said Petition mentioned, was made and entered into by the parties to the same under mistake, and in ignorance of the actually existing rights and interests of such parties in the said fishery. And farther declare: that the said agreement is not in equity binding upon the Appellant and Respondents, but ought to be set aside, subject to the Appellant paying to the Respondents a proper occupation rent for the said excepted piece of land and cottage, to be ascertained by the Master in the usual manner; and subject also, as hereinafter is mentioned, that is to say, the Respondents claiming to have a lien on the said fishery on account of the moneys said to have been expended by the said *Edward Joshua Cooper* in obtaining the said Act of Parliament, and in purchasing the said rights of fishery, and in making and improving the same. Let the said Petition stand over for six months, with liberty for the Appellant to bring before the Court, by Supplemental Petition, all persons interested with respect to the said claim, and refer it back to the Court to do as may be just on such Supplemental Petition, having regard to the aforesaid declaration; and if the Appellant shall fail to file such Supplemental Petition within the period aforesaid, or such farther period as may be allowed by the Court, then let the present appeal be dismissed with costs.

Upon these grounds, I move your Lordships that the decree below should be reversed, subject to those declarations.

LORD WESTBURY:—

My Lords, for the purpose of determining the question raised by this Cause Petition, it is necessary to ascertain the rights and interests of the parties at the time of making it. Now, it is clear I think, beyond the possibility of argument, that the hereditaments which constitute the estate of *Ballysadare*, including the fishery, were comprised in the covenant and agreement of *Edward Synge Cooper* and *Edward Joshua Cooper*, contained in the settlement of 1827. That settlement plainly indicates, in every part of it, the agreement of the parties to include all the estates that should descend from the lunatic, *Joshua Edward Cooper*. First, with regard to an annuity given as a provision for *Edward Joshua Cooper*, it is charged on all the estates, "on all and every the other estates of *Joshua Edward Cooper*, situate in the county of *Sligo*," not comprised in two indentures which are therein specified; and then the covenant and agreement comprehend "all other the estates of inheritance," whereof the lunatic, *Joshua Edward Cooper*, should die seised. The effect, therefore, of this extent of the deed of 1827 was to make *Joshua Edward Cooper*, at the time of the obtaining of the Act of Parliament of the 1st Vict., a trustee in fee seised of the legal estate in fee for the parties entitled under the uses and trusts of that settlement.

Now, I must of necessity assume that *Edward Joshua Cooper* had the intention of stating the truth and the fact to the Legislature. When, therefore, I find in this Act of Parliament a recital that this fishery, together with the other hereditaments, on the death of the lunatic descended to *Edward Joshua Cooper* in fee, that must be taken to represent to Parliament that the trust estate did so descend. Your Lordships are bound to assume *Edward Joshua Cooper's* honesty and integrity of purpose, and therefore you cannot for a moment impute to him that he intended to conceal from the Legislature the fact of the property being bound by the trusts of the settlement. You must take the recital contained in the Act of Parliament as a recital intended to denote the descent of the legal estate in fee held by him upon trust, and you cannot impute to him an intention of representing to Parliament that it was his own property, because you cannot for a moment suppose that he was ignorant of the agreement or contract contained in that deed, or that he intended to repudiate the obligation which he had contracted under that deed.

Then, if it be taken that he stood before Parliament as a trustee, the powers and authorities conferred upon him by that Act of Parliament are conferred upon him in his character of trustee. They are attached to the ownership in fee, which he represents himself to have had, and as that ownership was subject to the trust, the powers and authorities attached to the ownership are in like manner subject to the obligation of that trust, and the things acquired by virtue of those powers and authorities would also be subject to the trusts which affected the individual who becomes the parliamentary donee of those powers. There can be no doubt for a moment, therefore, with regard to the settled principles of equity, that what was given to him in the character of owner in trust for the other persons, and what was acquired by him by virtue of those powers, became also subject to that trust. The result, therefore, is, that all that he acquired by virtue of the parliamentary powers would become subject to the trusts of the settlement of 1827, subject only to the repayment to him by the parties entitled under those trusts of the moneys properly expended by him in acquiring additional rights of fishery, and improving the whole.

The Act of Parliament contemplates that there would be one fishery only, a fishery constituted of the original right in the fishery of *Ballysadare*, and augmented and improved by gathering in other rights of fishery, extending over the shore of the bay, which he had the power of acquiring, so that there might be one large profitable fishery. Now, the fishery, in point of fact, ends with the estuary, and with the beginning of the cut, because the cut or canal was intended only to improve the fishery, I might almost even say to continue the fishery, because we well know that there can be no fishery from the resort of salmon, unless the salmon have the means of ascending to the breeding grounds in the higher quarters, and they resort to these places only when they have that opportunity. One fishery, therefore, was constituted by virtue of those powers, and that fishery was again conveyed by the settlement of 1858, under which the present Petitioner is tenant for life.

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The result, therefore, is, that at the time of the agreement for the lease which it is the object of this Petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The Petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father, that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a Court of equity with regard to the dealing with that agreement. It is said, "*Ignorantia juris haud excusat;*" but in that maxim the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the Respondents believed themselves to be entitled to the property, the Petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand.

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But then, when the Appellant comes here to set aside the agreement, an obligation lies upon him so to constitute his suit as to enable a Court of Equity to deal with the whole of the subject-matter, and once for all to dispose of the rights and interests of the parties in the settlement. Now although the agreement was inoperative for the purpose of giving to the Petitioner a valid lease of the property, yet it might operate to this extent, that so far as the Respondents had in equity a lien upon the property, their estates and interests in respect of that lien might be affected by the agreement. And there is another particular also which must be noticed, which for the moment, I think, in the preparation of these minutes, has escaped our attention, namely, that unquestionably the Respondents were entitled to the cottage and to the piece of land, upon which no rent has been paid. But, during the time that has elapsed, I understand the fact to be, that the Petitioner has had the possession and enjoyment of that cottage and of that piece of land. In respect of those particulars, therefore, a proper occupation rent ought to be paid by him.

What, then, are the rights and interests of the parties which ought to be ascertained? They are, as I have already observed, the sum of money due to the Respondents, and charged upon the property, as being the expenditure of their father, the benefit of which the Petitioner, as tenant for life, has enjoyed. Now, no doubt that expenditure constitutes a lien—a charge in the nature of a mortgage charge upon the property. It must be ascertained, and an obligation lies upon the present Appellant to give the Court the means of ascertaining it. That is the reason, therefore, why the decree is proposed to be put in the form which your Lordships have heard, namely, that although a declaration is made, in order to shew the basis upon which the opinion of the House is founded, with respect to the invalidity of the agreement, yet the House stops short of giving positive relief, except on the terms imposed on the Petitioner, to which in reality, by the prayer of his Petition, he submits, by giving an opportunity to the Respondents to ascertain the full measure of their rights and interests, in order that complete justice may be done, by declaring that they will be entitled to a charge for the principal money so ascertained, and to interest thereon, at the rate of 4 per cent., from the time of the death of their father, *Edward Joshua Cooper*, who was the last person in possession of the fishery antecedent to the title of the present Appellant, and declaring also (which must be added to that), that they are entitled to an occupation rent during the time that the present Appellant has been in possession and enjoyment of the cottage and the piece of land.

My Lords, these terms, I have very little doubt, will be submitted to by the Petitioner, because they are consistent with the willingness, which he has expressed in his Petition, to have the whole of the rights ascertained. And if that be done, and if he brings before

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the Court, by Supplemental Cause Petition, the parties who are interested in the ascertainment of those rights, the subject will be disposed of; but, if he does not do so, then he has brought forward an insufficient and incompetent Petition, upon which full equity and full relief cannot be given, and the only result must be, that his Petition to the Court below ought to be dismissed, though it must be dismissed upon quite different grounds.

My Lords, I regret to find that observations have been made in the Court below, though I cannot at all suppose that they were the *ratio decidendi*, that upon some extrinsic evidence it appeared to the Court below that the fishery was not intended to be comprised in the deed of 1827. When there is an application to correct an instrument, or to set aside an instrument, the intention of the parties is to be collected from the words they have used; and no words can be more pertinent or more comprehensive than the words in the settlement of 1827, and the words in the settlement of 1858, to denote the intention of including the fishery in the provisions of those deeds, and making it subject to the trusts which are thereby created.

LORD COLONSAY:—

My Lords, I do not think it necessary to add anything to the observations which have been made by my noble and learned friends. I entirely concur with the views which have been taken as to the relative rights of the parties in this case, and I think that the course which has been suggested for doing justice between them, in regard to those relative rights, is the best calculated to attain that end.

Decretal order reversed, and cause remitted, with a declaration.

Lords' Journals, 31st May, 1867.

The declarations suggested by their Lordships were afterwards embodied in an Order, which was in substance as follows:—

It is declared that the lands and hereditaments conveyed to *Joshua Edward Cooper* by the deed of the 12th of May, 1806, in the proceedings mentioned, including the fishery of *Ballysadare*, were comprised in the settlement of the 13th of February, 1827, and were bound by the covenant of *Edward Joshua Cooper* therein contained, and that at the time of the passing of the Act of Parliament of 1 Vict. c. lxxxix., the said *Edward Joshua Cooper* was a trustee of the lands, hereditaments, and fishery of *Ballysadare* for the persons entitled under the trusts of the aforesaid settlement of the 13th of February, 1827, and that the rights, powers, and interests granted to the said *Edward Joshua Cooper*, his heirs and assigns, by the said Act of Parliament, must be deemed to have been taken by him as a trustee for the persons entitled under the settlement of the 13th of February, 1827, including himself as tenant for life, and that all the estates, rights, and interests acquired by the said *Edward Joshua Cooper* under and by virtue of such powers, and the canals and works made and constructed by him, by virtue of the said Act, were acquired, made, and held by him in like manner in trust for himself and the other persons entitled under the said settlement of the 13th of February, 1827 : and it is farther declared, that the said lands and fishery of *Ballysadare* were also comprised in the settlement of the 6th of August, 1858, and that under and by virtue of the said several settlements the Appellant was, at the time of the making of the agreement of the 14th of October, 1863, in his Cause Petition mentioned, entitled as tenant for life to the said lands and fishery of *Ballysadare*, including therein the rights and interests and works acquired by the said *Edward Joshua Cooper* as aforesaid, save and except only the piece of land, with the cottage and buildings thereon, demised by the deed of the 27th of September, 1858, but that the said *Edward Joshua Cooper* was, and his executors, administrators, and assigns, are, entitled in equity to a lien upon the said lands and fishery of *Ballysadare* for the amount of the moneys properly expended by him in soliciting and obtaining the said Act of Parliament, and in acquiring the several rights and interests which were obtained by him under and by virtue of its powers and provisions, and which were properly expended by him in making and constructing the canal or cut, with its attendant works for the purposes of the said fishery, and that interest ought to be computed thereon respectively at the rate of four per cent. from the time of the death of the said *Edward Joshua Cooper*, and that the right to such principal moneys and interest, and to a lien in respect thereof, is now vested in the Respondents : and it is farther declared, that the aforesaid agreement of the 14th of October, 1863, in the said Cause Petition mentioned, was made and entered into by the parties to the same under mistake, and in ignorance of the actually existing rights and interests of such parties in the said fishery : and it is farther declared, that the same agreement is not in equity binding upon the Appellant and Respondents, but ought to be set aside, subject to the Appellant paying to the Respondents a proper occupation rent for the said excepted piece of land and cottage, and the buildings on the said land, to be ascertained by the Master in the usual manner, and subject also as hereinafter mentioned, that is to say, the Respondents claiming to have a lien on the said fishery on account of the moneys said to have been expended by the said *Edward Joshua Cooper*, in obtaining the said Act of Parliament, and in purchasing the said rights of fishery, and in making and improving the same. It is ordered, that the said Cause Petition do stand over for six months, with liberty for the Appellant to bring before the Court by Supplemental Petition, all persons, parties entitled to the said lands and fishery of *Ballysadare*, under and by

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virtue of the said deeds of the 13th of February, 1827, and 6th of August, 1858, respectively, and if it shall be found that all such parties are duly represented in the said Court, then it is farther ordered, that it shall be ascertained and stated what sums of money were properly expended by the said *Edward Joshua Cooper* in soliciting and obtaining the said Act of Parliament, and in acquiring the rights and interests obtained by him under its powers and provisions, and also in making and constructing the cuts or canals, and otherwise improving the said fishery, in conformity with the provisions and directions of the said Act: and it is farther ordered, that interest be computed on all such several sums at four per cent. from the death of the said *Edward Joshua Cooper*, and that the total amount thereof be certified, and a day fixed for payment thereof by the Appellant; and in case the amount so certified shall be paid by the Appellant to the Respondents in conformity with the said report, it is ordered, that a deed be settled and approved as shall be necessary or proper for the purpose of releasing or conveying the said lands, hereditaments, and fishery, including therein the rights, interests, and works acquired and made by the said *Edward Joshua Cooper*, unto or for the benefit of the Appellant and such other persons as shall be found to be entitled thereto under and by virtue of the aforesaid settlements and deeds, having regard to the declarations aforesaid: and it is further ordered, that the same, when settled, be executed by the Respondents and all other necessary parties, and that the Appellant and Respondents respectively be at liberty to apply to the Court below as occasion shall arise in carrying this order and these declarations into effect: and it is farther ordered, that if the Appellant shall fail to file such Supplemental Petition within the period aforesaid, or such farther period as may be allowed by the Court, then, that the present appeal be dismissed, with costs, the amount of such costs to be certified by the Clerk of the Parliaments.

Solicitors for the Appellants: *Farrer, Ouvry, & Farrer.*
Solicitors for the Respondent: *Fearon, Clabon, & Fearon.*

HENRY RICKET . . . . { PLAINTIFF IN ERROR;

AND

THE DIRECTORS, &c., OF THE METROPOLITAN RAILWAY COMPANY . . . . . } DEFENDANTS IN ERROR.

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Feb. 14, 15;
May 16

7 App Cas 260, -5 273-5 280-1-2-3 284-9, 290-6 299, [illegible] L 322
2 C P. 5.25
— 64?-3
— 648, -9
650
3 C P. 85, -8, -9
— 92, -4, -5
96, -7, -9
103, -5, -6,

Railway Acts—Private Act—Compensation for Injuries—Injuries to Trade.

Unless an injury to an individual, occasioned by the act of a public company, would have been the subject of a claim for damages before the company obtained statutory powers to do that which occasioned the injury, it could not (except expressly so provided), be a subject for compensation when occasioned by something done in the exercise of those powers.

No case comes within the purview of the 68th section of the *Lands Clauses Act*, or the 6th section of the *Railways Clauses Act*, unless in respect of damage to the land itself, which damage would have been the subject of an action at law before those statutes.

A mere temporary obstruction (the cause of loss of trade to an individual), occasioned by the performance of some lawful and necessary work, would not have been the subject of such an action—and is not, under the 16th section of the *Railways Clauses Act*, the subject of compensation:—

Semble, per LORD CHELMSFORD, L.C.:—It does not follow, because a party might have had a right of action before the statute, that he would, in respect of the same cause, have a title to claim compensation after it.

R. was the occupier of a public house, situated by the side of a public footway. A company obtained powers under certain Acts of Parliament (with which the provisions of the *Lands Clauses Act*, and the *Railways Clauses Act*, were declared to be incorporated), to make a railway. The company in carrying these powers into execution, obstructed streets leading to this footway so as to make the access to the public house inconvenient. The obstructions were not permanent, and, after some time, the streets were restored to their original condition. It was found by the jury that there was no structural damage to the premises, but that *R.* had sustained damage in respect of the interruption to his business.

Held (*diss.* Lord *Westbury*), that *R.* was not entitled under the 68th section of the *Lands Clauses Act*, nor the 6th or the 16th sections of the *Railways Clauses Act*, to receive compensation for injury to his trade consequent upon these obstructions.

Per LORD WESTBURY:—The words of the *Railways Clauses Act*, "injuriously affected," do not mean wrongfully in the sense of unlawfully, but "damnously," that is injuriously, affected in the ordinary sense of that word.

And—There is nothing in these two statutes to warrant the position that there shall be no compensation, where at common law there would have been no right of action.

And also—The trade carried on in particular premises is a thing appertaining to the premises, and, as such, is included in the "interest" of the

4 Q B. 193, — 358, 360, —
4 H L. 179, 197
6 Q B 422 —
5 H L. 426
461,
6 Q B D 2

14 Ch D 542, -6, 550, -1 -5
7 C P 506, 511, -4, -5
8 C B 191 -2 -5 -6 -7 262 -3 -4 -5 -6,
7 H L. 243, -4, -7, -8, 251, -4, -5, 261, -5

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occupier; and that interest is part of the value of the property, and if injuriously affected, is to be compensated.

And also—The meaning of "parties interested," in the 16th section of the *Railways Clauses Act*, is, parties sustaining a special and individual loss by reason of the works which the section empowers the company to construct and *R.* was entitled to compensation under this section.

THIS was a proceeding in error upon a decision of the Exchequer Chamber which had reversed a previous decision of the Court of Queen's Bench.

Ricket was the occupier of a public house, with the sign of the *Pickled Egg*, situated in a place formerly called *Pickled Egg Walk*, but now known as *Crawford Passage*, and he complained of injury occasioned to his business by the works of the Defendants. The position of the premises was this: The main thoroughfare, from the top of *St. John Street* westward to *Liquorpond Street*, went along a street called *Bowling Green Lane*, which, at its western extremity, came upon a broad road called *Coppice Row*. Opposite the end of *Bowling Green Lane* was *Clerkenwell* workhouse, under one end of which was a footway which led the foot passenger to *Crawford Passage*, at a spot directly in face of the *Pickled Egg* public house, whence there was a descending pathway, made wide enough at the bottom to admit carts, and opening upon *Back Hill*, which led up to *Liquorpond Street*. The Defendants, under the authority of their Acts, blocked up the carriage way of *Bowling Green Lane* and *Coppice Row*, and erected hoardings, but gave a passage to foot passengers by steps and a temporary bridge across *Coppice Row* to the passage which led to the Plaintiff's house, and at the same time made another communication in a diagonal line which enabled any one to go by a shorter route from the end of *Bowling Green Lane* to the foot of *Back Hill*. These hoardings and steps were continued for twenty months, and then the streets and passages were restored to their original condition.

Ricket complained that his business had been injured by the obstructions, and, under the provisions of the 8 & 9 Vict. cc. 18 and 20 (the *Lands Clauses* and the *Railways Clauses Acts*), sought compensation (1). The case in the first instance was heard before the under-sheriff and a jury, and the two questions left were these: First, whether the structure of the house and premises, or any part thereof, had been injured or injuriously affected by the railway works, or in the execution of any of those works. Secondly, with respect to a claim for loss of profits, whether, by reason of the obstruction of the carriage way of *Coppice Row*, the Plaintiff had sustained any particular damage or injury. The jury found that there was no damage done to the structure of the house or premises, but that the Plaintiff had sustained damage in respect of the interruption to his business, and so gave a verdict for him on that matter for the sum of £100. The case was afterwards removed into the Court of Queen's Bench by *certiorari*, the facts were turned into a special case, and the question for the opinion of the Court was, "whether the loss of customers by the Plaintiff in his trade, under the above circumstances, was such damage as entitled him to recover from the company?" The Court of Queen's Bench, consisting of four Judges, on the 22nd April, 1864, unanimously gave judgment in favour of *Ricket*. The case was taken on error to the Exchequer Chamber, where it was heard by six Judges, four of whom were for reversing, and two for affirming, the judgment of the Court below (1).

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(1) 8 & 9 Vict. c. 18, s. 68, contains these expressions: "*If any party* shall be entitled to any compensation *in respect* of any *lands, or* of *any interest therein*, which shall have been taken for, or *injuriously affected* by, the

7 H L 255

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execution of the works," he is to follow the course therein directed as to having a jury summoned, &c. That had been done in this case.

8 & 9 Vict. c. 20, s. 6: "The *Railways Clauses Consolidation Act*, 1845." "In exercising the powers, given to the company by the special Act, to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act, and in the *Lands Clauses Consolidation Act;* and the company shall make to the *owners and occupiers of, and all other parties interested in, any lands* taken or used for the purposes of the railway, or *injuriously affected* by the construction thereof, *full compensation for the value of the lands* so taken or used, and *for all damage sustained by such owners, occupiers, and other parties,* by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company," the amount of such compensation to be ascertained as provided in the *Lands Clauses Consolidation Act.*

Sect. 16, after giving powers to execute works, goes on thus: "Provided always, that in the execution of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special Act, and any Act incorporated therewith provided, *to all persons interested, for all damage by them sustained by reason of the exercise of such powers.*"

(1) 5 B. & S. 149–156; 34 L. J. (Q. B.) 257; 11 Jur N.S. 260

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It was therefore reversed. Error was then brought to this House.

Mr. *Keane*, Q.C., and Mr. *J. C. F. S. Day*, for the Plaintiff in Error:—

The question mainly turns on the meaning to be given to the 6th and 16th sections of the *Railways Clauses Consolidation Act*, 1845 (1). Those sections treat of injuries sustained by the owners or occupiers of land taken and used, of land taken though not used, and by the owners and occupiers of land neither taken nor used, but "injuriously affected," and relate to "all persons interested" who may sustain damage from the works of the railway company. The claim here is in respect of the last of these matters. The contention on the other side that, unless a person can maintain an action for damages for what has been done independently of the authority of a statute, he cannot maintain any claim for compensation, however injuriously his interest may be affected, if the work is done under the authority of the statute, cannot be supported. The case which is most relied on as authorizing that argument is that of the *Caledonian Railway* v. *Ogilvy* (2). It is submitted that that doctrine is not deducible from that case, but, even if so, it will not affect the present, for here, within the words of the *Railways Clauses Consolidation Act*, 1845, the Plaintiff's "interest" in the land he occupies has been "injuriously affected." Though so affected in the way of consequential damage, he is entitled to compensation. In the Court below it was assumed that he had no title to compensation, because the injury of which he complained was merely personal, and was such as all the other residents in the neighbourhood, or the public at large, might also suffer. But it was an individual injury, "substantially more injurious to himself than to the public at large:" *Rose* v. *Miles* (3); and therefore was the subject of an action for damages. So in *Greasly* v. *Codling* (4), the interruption of the Plaintiff's business as a coal higgler was occasioned by the same causes which might affect the public at large, but as they produced a special damage to him, he was held entitled to compensation. *Iveson* v. *Moore* (5)

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(1) See *ante*.
(2) 2 Macq. Sc. Ap. 229.
(3) 4 M. & S. 101.
(4) 2 Bing. 263.
(5) 1 Ld. Raym. 486.

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and other cases referred to by *Erle*, C.J., in his judgment in the Court below (1), are to the same effect.

In the construction of the statute this claim to compensation must not be restricted to cases where the injury to the land is direct and immediate. The statute speaks of persons "interested in" any lands, and whose interests are "injuriously affected." The interest which a man has in lands occupied by him is not confined to the configuration of the land, or to its produce, but extends to every valuable use he may make of the land. On that principle rates are imposed in respect of a benefit to be derived through its occupation: *Rex* v. *Bradford* (2), where the occupier of certain premises adjoining some barracks was rated in respect of the use he made of them as a canteen, the mere rent of the premises, independently of that particular use, being very inconsiderable. The like principle was adopted in *Bourne* v. *The Mayor of Liverpool* (3). [THE LORD CHANCELLOR:—In rating cases, the Courts always held that anything which added to the value of a house was to be added to the amount at which it was to be rated.] In other cases, too, the same principle has been applied. In *Potter* v. *The Commissioners of Inland Revenue* (4), goodwill was treated as a property, the assignment of which subjected the conveyance to stamp duty under the 13 & 14 Vict. c. 97. It is for injury to a property of that kind that the Plaintiff claims compensation. In *Cameron* v. *The Charing Cross Railway Company* (5), Mr. Justice *Willes* described as an injury to land damage to a business carried on upon it. [THE LORD CHANCELLOR:—I do not understand that regular customers were prevented going to the Plaintiff's house, but that, in consequence of the obstructions, persons who were passing along turned another way.] That would occasion him an injury, and would diminish the value of his house. The case of *Rex* v. *The Directors of the Bristol Dock Company* (6), where compensation was refused, does not apply, for the complaint there was only of the injury to an easement which the person injured merely enjoyed in common with all others of the King's subjects. Here the injury is to the Plaintiff's special interest alone. *Rex* v. *The London Dock Company* (7) turned entirely

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(1) 5 B. & S. 159; 11 Jur. N.S. [illegible]
(2) 4 M. & S. 317.
(3) 33 L. J. (Q.B.) 15; 10 Jur. N.S. 125
(4) 10 Ex. 147; 18 Jur. 778
(5) 16 C. B. (N. S.) 430; 15 Jur. [illegible]
(6) 12 East, 428.
(7) 5 Ad. & E. 163.

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on the words of the private Act, which were not so strong as they are here. But that case itself shews an intention on the part of the Legislature to afford compensation not merely to the owners but also to the occupiers of land, although that particular claim was not deemed to come within the scope of that intention. In *Brand* v. *The Hammersmith Railway Company* (1), it was held that the owner of premises adjoining a railway was not entitled to compensation for the injury he sustained from the smoke, noise, and vibration caused by running engines, there being no structural injury to the premises. But that case is in direct opposition to *Reg.* v. *The Eastern Counties Railway Company* (2), where the lowering of a road adjoining the land, without entering upon or taking the land itself, was held sufficient to entitle the landowner to a peremptory mandamus to assemble a jury and assess compensation. It is also in opposition to the principle to be deduced from *Glover* v. *The North Staffordshire Railway Company* (3), where an interruption to a man's performance of his business, and danger to him in performing it, were held to be sufficient to give him a title to compensation in respect of his land being "injuriously affected" within the meaning of the *Lands Clauses Consolidation Act.* In *Jubb* v. *The Hull Dock Company* (4), compensation was granted to a landowner not only for the premises he was obliged to give up, but for the injury he would sustain while endeavouring to obtain suitable premises elsewhere for carrying on his business as a brewer. It is clear that though one act may occasion injury to the public at large, one of the public may sustain a particular injury from it, such as does not affect others. The principle of law is plain, that in such a case he is entitled to compensation for that particular injury. The argument, therefore, that where the act occasions a general injury no individual can seek for compensation in respect of it, is far too vague and general, and cannot be maintained.

Two cases in Chancery strongly sustain the right of the Plaintiff to make this claim. In the *East and West India Docks* v. *Gattke* (5), Lord Chancellor *Truro* refused to interfere to restrain

12 Jur NS 336

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(1) Law Rep. 1 Q. B. 130; but see that case, Law Rep. 2 Q. B. 223.

(2) 2 Q. B. 347.

(3) 16 Q. B. 912.

(4) 9 Q. B. 443.

(5) 6 Railw. Cas. 371; 3 Mac. & G. 155.

a party from proceeding to enforce at law, under the *Lands Clauses Consolidation Act*, his claim for compensation, where his property had been injuriously affected, though his land had not been directly interfered with by the acts of the company. And in the *London and North Western Railway Company* v. *Bradley* (1), which was the case of damage done to beer in the cellars of a public house by the vibration occasioned by the passing of the trains, though the company obtained an injunction in the Court of a Vice-Chancellor, his Lordship, on appeal to him, adhered to his former decision, and dissolved the injunction.

The interest spoken of in the 16th section is introduced there without any restrictive application—the words used comprehend "any interest," and give a right to claim compensation to any person who resides on the spot affected by the works. [LORD WESTBURY:—If what was done here was done under the powers of the company's acts, must not the Plaintiff bring himself within the words of the section as a party having an individual interest, as distinguished from one of the public?] He has done so here.

The principle acted on in *Chamberlain* v. *The West of London and Crystal Palace Railway Company* (2), which was fully considered in the Courts of Queen's Bench and Exchequer Chamber, plainly establishes the right of the Plaintiff to the compensation he seeks. There the works were executed in accordance with the powers of the Acts, but damage being occasioned to the Plaintiff's houses by obstructions, which rendered the access to them difficult, and so made them less capable of being used as shops, and, consequently, less capable of being let for that purpose, the company was held bound, under the 68th section, to afford him compensation. The injury there was to a possible interest—here it is to an existing interest. The cases of *Senior* v. *The Metropolitan Railway Company* (3), and *Cameron* v. *The Charing Cross Railway Company* (4), directly support the principle there acted on, and shew that the business carried on in a house constitutes part of the value of the house. In the latter of these two cases Mr. Justice *Willes* expressly stated that "damage to a man's interest in land necessarily includes damage to the business which he carries on upon

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(1) 3 Mac. & G. 336; 6 Railw. Cas. 551.

(2) 2 B. & S. 605, 617; 9 Jur. N.S. 1051

(3) 2 H. & C. 258; 9 Jur. N.S. 902

(4) 16 C. B. (N.S.) 430; 10 Jur. N.S. 635.

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the land," and said that such an interest was not merely personal, but, applied to a business, was called "goodwill," and was "a marketable thing." If the house itself is taken, everything which gives it value is considered in assessing compensation—if not taken, but injured, the same rule must undoubtedly be held to apply. In *Re the Stockport Railway Company* (1), Mr. Justice *Crompton* held that the owner of a cotton-mill, part of whose land had been taken by a railway company, was entitled to compensation in respect of the value of his mill being injuriously affected by the danger of fire from the passing of the railway trains, so that it could not be insured except at an increased premium. And in *Wilkes* v. *The Hungerford Market Company* (2), the Plaintiff was held entitled to recover because, in consequence of the works of the company, customers had been diverted from coming to the Plaintiff's house. That case is exactly in point with the present.

Mr. *Hawkins*, Q.C., and Mr. *Rochfort Clarke*, for the Defendants in Error:—

The injury here complained of is one that was never intended to be made the subject of compensation. The Plaintiff, if he has any claim for compensation at all, comes, not under the 6th or 16th sections of the 8 & 9 Vict. c. 20, but under the 46th, 53rd, 55th, and 56th sections of that statute. The 46th section requires that where a road or footway is interfered with, another shall be provided; the 53rd section is directed to the same object; the 55th enacts that if any party entitled to a right of way over any road so interfered with, shall suffer any special damage by reason of a substituted road not being properly provided, he may recover the amount of such special damage from the company; and the 56th fixes the period for restoring the roads to their former state, and the penalty to be incurred if that is not duly done. Here no such claim existed—the substituted roads were provided, and it was the mere whim of the passengers that they did not pass, as before, in front of the Plaintiff's house. The Defendants in Error cannot be made responsible for that. On the supposed obstruction of the carriage way, by the execution of the works, it was distinctly found that the Plaintiff's house had not suffered any injury, but,

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(1) 33 L. J. (Q.B.) 251, 10 Jur. N.S. 612 (2) 2 Bing. N. C. 281.

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because the foot passengers had not gone to his house as before, these damages were given. They were too remote to be damages within the contemplation of the statute. [THE LORD CHANCELLOR remarked that the statement of the case was defective—it did not state whether the substituted way was or was not as convenient as the old one.] It does not state that any damage arose from any insufficiency of the footway, and, therefore, it must be assumed that the footway was sufficient.

The interest in the house itself cannot be said to have been injuriously affected. Now in all the cases where compensation had been given, the land itself had been affected. That was so even *In re The Stockport Railway* (1), and so it had been long ago: *Meynell* v. *Saltmarsh* (2). The case of *Wilkes* v. *The Hungerford Market Company* (3), has no bearing on the present question—that merely declared what, under the particular circumstances which existed in that case, would establish a right of action; but here the question is, whether, the works being lawful, and there being no right of action in that respect, the Plaintiff has a right to compensation by a novel interpretation of certain words in the statute. It has been a universal principle of decision that when a highway is lawfully diverted there can be no action in respect of an injury sustained by any one in consequence of such a diversion. The same principle applies here. These compensation clauses introduce no new right—they merely create a new form of proceeding as to rights already established. By the course of the common law, if a highway was to be diverted a writ of *ad quod damnum* might issue. If injury would be occasioned by the proposed diversion that was returned, and relief was given. When the return shewed that the alteration might be made without injury, the alteration was made, and then no right to compensation arose upon it: *Ex parte Vennor* (4). This practice is referred to by Lord *Mansfield* in *Rex* v. *Flecknow* (5). The course now followed of introducing compensation clauses is a mere change of form for the old writ of *ad quod damnum*, but the substance of the two proceedings is the same. The Legislature has given compensation where it was deemed to be required, but the claim to it cannot be made on

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(1) 33 L. J. (Q.B.) 251, 10 Jur. N.S. 614 (2) 1 Keb. 847. (3) 2 Bing. N. C. 281.
(4) 3 Atk. 766. (5) 1 Burr. 461.

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mere inference. The 54th section of the 8 & 9 Vict. c. 20, provides a penalty for not substituting a road for one shut up, but not for any private interest connected therewith; that shews that a claim like the present was never intended to be allowed. No such interest, therefore, as the Plaintiff now sets up can be imported into the application of the statute. The principles of all these claims were fully considered in this House in the case of *The Caledonian Railway Company* v. *Ogilvy* (1), in which Lord *St. Leonards* said (2), "Where is the difference between a public river and a public road; the rights of both are common. If you have only that common right which belongs to all men, you cannot claim compensation in regard to a damage to either the one or the other which is authorized by Act of Parliament." And Lord *Cranworth* observed (3), "In these Acts of Parliament, the Legislature means to authorize these public companies, for the convenience and advantage of the public, to do acts with regard to which they are not only relieved, in respect of what they are doing, from indictments at the instance of the Crown, but they are also entitled to do them without being liable to redress at the suit of individuals. That cannot be better illustrated than by the case which has been put by Mr. *Anderson*, that they are authorized to have a railway upon a crossing, having gates to prevent persons passing along the road at times when it would be dangerous, by reason of trains being near at hand. That necessarily, therefore, occasions stoppages to persons, which, if there were not an Act of Parliament, would entitle them to bring an action against the railway company. It is clear that the Legislature meant to exclude any right of action in such a case as that. Now, that being the case, suppose that without any Act of Parliament having been passed for making this railway, certain speculators had taken upon themselves to make a railway across a public road, and had erected gates; certainly the owner of the estate might, with respect to any detention occasioned to him by the closing of those gates, bring an action against the makers of the railway, and as he might do this *toties quoties*, he would probably have more frequent rights of action than other subjects of Her Majesty. But it would only be a more frequent repetition of the same damage, it would not be a damage different from that

(1) 2 Macq. Sc. Ap. 229. (2) Ibid. 251. (3) Ibid. 236.

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which might be sustained by any other subjects of Her Majesty; for all attempts at arguing that this is a damage to the estate is a mere play upon words. It is no damage at all to the estate, except that the owner of that estate would oftener have a right of action than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it. It appears to me, therefore, clear, by the Acts of Parliament, and by the intention of the Legislature, that there is no right of compensation whatever; for, except for any actual detention, no right of action would have existed, if the making of the railway had not been authorized by Parliament, and the detention caused by the necessary closing of the gates is certainly made lawful by the Act." The provision as to damage to "any person interested," spoken of in the 16th section, was not intended to apply to any person whose interest might be possibly injured by the consequence of any alteration in a public highway. And, independently of the statute, no person can have an action for a public nuisance, but if he suffers a special damage from it, he may maintain an action for that special damage; but he must shew that it distinctly bears that character. The diversion of ordinary traffic is not such an injury: *Rex* v. *The Bristol Dock Company* (1); *Hubert* v. *Grove* (2). The doctrine laid down in those cases was supported by the well-considered judgment of Lord Chancellor *Cottenham*, in *The London and North Western Railway Company* v. *Smith* (3). [LORD WESTBURY:—The question there was, whether the Court of Chancery would restrain the complainant from proceeding under the statute.] In *The East and West India Docks* v. *Gattke* (4), the Lord Chancellor did not interfere to stop proceedings under the statute, but he expressed no opinion in favour of the right to institute them: *The London and North Western Railway Company* v. *Bradley* (5) is nothing more than an adoption of the course followed in the preceding case. All the cases in which the claim to compensation has, under such circumstances, been directly recognised, are cases affecting land as land. The case of *Reg.* v. *The Great Northern Railway Company* (6), was that of a ferry, which it

(1) 12 East, 429.

(2) 1 Esp. 148.

(3) 1 Mac. & G. 216.*

(4) 3 Mac. & G. 155; 6 Railw. Cas. 371.

(5) 3 Mac. & G. 336; 6 Railw. Cas. 551.

(6) 14 Q. B. 25

was there said would pass with a conveyance of the land "and all profits and commodities belonging to the same." The same principle applied in the cases of *Jubb* v. *The Hull Dock Company* (1); *Brand* v. *The Hammersmith Railway Company* (2); *Chamberlain* v. *The West of London Railway Company* (3); and *Reg.* v. *The Great Eastern Railway Company* (4), in the last of which an easement arising from the possession of land had been interfered with. The case of the *Caledonian Railway Company* v. *Ogilvy* (5) is decisive of the present. [The Lord Chancellor:—Attention was there called to only one of the sections, which corresponds to the section in the English Act in the use of the words "injuriously affecting" lands. The words are not the same as those in the 16th section here.] They are not; but still it cannot be said that any interest in land was injuriously affected, when nothing was affected but the temporary profits of a business carried on upon the land.

The case of *Penny* v. *South Eastern Railway Company* (6), shews distinctly that matters merely relating to the enjoyment of land cannot be made the subject of compensation. There, the deterioration of the land, by the vibration occasioned by the passing of trains, was held not to be the subject of compensation; but actual injury to the premises themselves caused thereby, by ballast trains, during the construction of the railway (but not afterwards) might be so. The distinction is clear. Here there was no damage but to the enjoyment of land, and no ground for compensation.

Mr. *Day*, in reply.

The Lord Chancellor (Lord *Chelmsford*), after fully stating the case, said:—

It is most desirable, as Lord Chief Justice *Erle* said, in the case of *Cameron* v. *The Charing Cross Railway Company* (7), "that if possible, some definite and precise rule should be laid down as to the true limits within which claims against railway and other com-

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(1) 9 Q. B. 443. 12 Jur N.S. 221

(2) 35 L. J. (Q.B.) 53; Law Rep. 1 Q. B. 130, but that judgment was reversed: see Law Rep. 2 Q. B. 223.

(3) 2 B. & S. 605; 9 Jur N.S. 1051

(4) 2 Q. B. 337.

(5) 2 Macq. Sc. App. 229.

(6) 7 E. & B. 660; 3 Jur N.S. 957

(7) 16 C. B. (N.S.) 430; 10 Jur N.S. 135

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4 HL. 201

3 Q B 326

4 Q B 368

7 C P 572

7 App Cas 256

panies for compensation in respect of damage caused by their works are to be confined."

It appears to me to be a hopeless task to attempt to reconcile the cases upon the subject. I must endeavour, by an examination of them, to determine which, in my judgment, are most in accordance with principle.

I think that the criterion of a party's right to damages under the clauses of the Railway and Companies Acts, upon which this case depends, is correctly stated by Lord *Campbell*, in *Re Penny and South Eastern Railway Company* (1); and that, in his words, "unless the particular injury would have been actionable before the company had acquired their statutory powers it is not an injury for which compensation can be claimed." At the same time the observation of my noble and learned friend, Lord *Cranworth*, in the case of the *Caledonian Railway Company* v. *Ogilvy* (2), must not be lost sight of; that, "it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment, but a right of action."

In the first place, then, it is material to inquire whether the Plaintiff in Error could have maintained an action against the Defendants for the alleged consequences of their acts, if they had been done without the authority of Parliament.

As far as I have been able to examine the cases, in all of them, except two, in which an individual has been allowed to maintain an action for damage which he has specially sustained by the obstruction of a highway, the injury complained of has been personal to himself, either immediately, or by immediate consequence.

The two excepted cases are those of *Baker* v. *Moore* (mentioned by Mr. Justice *Gould* in *Iveson* v. *Moore* (3)); and *Wilkes* v. *Hungerford Market Company* (4). In the former of these cases the Defendant had erected a wall across a public way, in consequence of which several of the Plaintiff's tenants left his houses, and he lost the profits of them. In the latter the Plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been

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(1) 7 E. & B. 660, 3 Jur N S 957

(2) 2 Macq. Sc. App. 235.

(3) 1 Ld. Raym. 486, 491.

(4) 2 Bing. N. C. 281.

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3 C P 100
9 CP 403

diverted from the thoroughfare by the Defendants continuing an authorized obstruction across it for an unreasonable time. In both these cases it was held that the action was maintainable. The case of *Baker* v. *Moore* appears to me to be even more doubtful than that of *Wilkes* v. *Hungerford Market Company;* and as to this latter case, Chief Justice *Erle*, in delivering the judgment of the majority of the Judges in the present case, observed (1):—"If the question were raised in an action now, we think it probable that the action would fail, both from the effect of the cases which preceded *Wilkes* v. *The Hungerford Market Company*, and also from the reasoning in the judgment in *Ogilvy* v. *Caledonian Railway Company*." In this observation upon *Wilkes's Case* I entirely agree. An endeavour was made by Lord *Denman* to reconcile that case with the decision which he pronounced in the case of the *London Dock Company* (2), but, in my opinion, not very successfully. It is impossible to discover any distinction between the consequential damage which constituted the cause of action respectively in the two cases. Lord *Denman* said, "In *Wilkes's Case* the act producing the injury was unauthorized by any statute for the period complained of; it was a public nuisance which might have been indicted, and *that* was the difficulty cast upon the Plaintiff. To which a sufficient answer was given by shewing that the specific injury of which he complained was one felt by himself alone, and beyond the common and public nuisance." If, however, the consequential damage is too remote to be the foundation of an action (as it was held to be in the case of *Rex* v. *London Dock Company*), it is quite immaterial whether no statutory powers have been given, or the given statutory powers have been exceeded. In neither case would an action lie.

9 C P 645
3 C P 86

My opinion being that the damage which is the foundation of the claim to compensation made by the Plaintiff in Error is too remote to be the subject of an action, I might be contented to rest my judgment against him upon this ground alone. But the diversity of opinion which has prevailed amongst the Judges as to the application of the clauses of the Acts in question to such a claim as is now under consideration, renders it almost imperative upon the House to pronounce an authoritative final decision upon the whole case.

(1) 5 B. & S. 161; 11 Jur N S 261

(2) 5 Ad. & E. 163, 178.

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Before, however, expressing my opinion, I must shortly examine the leading cases, which exhibit the variety of judgment in the different Courts upon the construction of the clauses in question.

It must be observed that the Judges in the Court of Queen's Bench, in the present case, confined their attention entirely to the 68th section of the *Lands Clauses Consolidation Act*, 1845, which provides for the mode of assessing compensation; while in the argument at your Lordships' bar, the claim of the Plaintiff in Error was rested either upon the 6th or the 16th section of the *Railways Clauses Consolidation Act*, 1845. There appears to me, however, to be no substantial difference between the language of the 68th section of the former, and the 6th section of the latter Act. The 68th section of the one Act applies to any party entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works. And the 6th section of the other Act compels a company to make to the owners and occupiers, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands, and for all damage sustained by reason of the exercise, as regards such lands, of the powers vested in the company. These sections appear to me to apply not to temporary, but to permanent works of companies. The 16th section of the *Railways Clauses Consolidation Act*, which I shall have occasion hereafter to consider more particularly, relates to the damage arising during the execution of the works.

Upon an examination of the cases, it will be seen that in most 9 CP 145
of them where the claim to compensation was admitted, there was an actual injury to the house or land itself, either immediate or immediately consequential upon the acts done. Thus, in *Reg.* v. *Eastern Railway Company* (1), the Railway Act provided that the company should make full satisfaction to persons interested in lands taken, used, or injured, for all damages sustained by executing the powers of the Act. The company had lowered a road whereby the claimant's land was injured and deteriorated, the access impeded, and additional fences rendered necessary. In *Glover* v. *North Staffordshire Railway Company* (2), the Plaintiff

(1) 2 Q. B. 347.
(2) 16 Q. B. 912.

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was the owner of land, appertaining to which was a right of way over a road. The company, under the provisions of the Act, constructed a railway crossing the road on a level, and erected gates on the road at each side of the railway, which were kept locked under the provisions of the Act, the servant of the company keeping the key, and the Plaintiff also having a key. The Plaintiff claimed compensation, and required the company to issue a warrant for a jury, and upon neglect to do so, brought debt for the amount claimed. The jury found the facts specially, and also that the land was depreciated in value. The Court, on that finding, held that the land was injuriously affected within the meaning of the *Lands Clauses Consolidation Act* and the *Railways Clauses Consolidation Act*. It might appear, at first sight, that the decision in the case of *The Caledonian Railway Company* v. *Ogilvy* (1), was opposed to this last case. There a public road was, under the sanction of an Act of Parliament, crossed by a railway on a level, and gates were placed across the road; and it was held by this House, reversing the interlocutor of the Court of Session, that the owner of a house near the newly erected gates had no claim for compensation for the inconveniences occasioned to him. But in this last case, the owner of the house had no other right over the road than that which belonged to the public generally, and the erection of the gates across the road where the railway crossed it upon a level was essential to the public safety. It is doubtful whether the owner of the house sustained any injury different in kind, though it might be greater in degree, from that of the rest of the public; and therefore it was questionable whether he could have maintained an action if the obstruction had been created without the authority of Parliament. But in *Glover* v. *The North Staffordshire Railway Company* (2), the Plaintiff had a private way appurtenant to his farm, which was obstructed by the company's works. His land, therefore, was injuriously affected, and, as Mr. Justice *Wightman* said, "Supposing no Act of Parliament had passed, and that had been done which was done, an action would have been maintainable." The case of *Reg.* v. *The Great Northern Railway Company* (3), resembles the one last mentioned, because the manner in which the land was alleged to be injuriously

7 App Cas 266
270

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(1) 2 Macq. Sc. App. 229. (2) 16 Q. B. 912. (3) 14 Q. B. 25.

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affected, was by the works of the company obstructing the access to a ferry which was appurtenant to the claimant's house.

The two cases next to be considered are those, upon the authority of which the Court of Queen's Bench (or, at all events, the Lord Chief Justice) decided the present case: *Chamberlain* v. *West End of London and Crystal Palace Railway Company* (1), and *Senior* v. *The Metropolitan Railway Company* (2). *Chamberlain's Case* was a claim for compensation, which was referred to arbitration under the *Lands Clauses Consolidation Act*. The award 2 CP 645, found that the claimant was lessee of four houses on the highway across which the railway was constructed, and of eight other houses, in the course of erection for the purpose of being used as dwelling houses, fronting a new road running at right angles to the highway, and that by reason of the obstruction of the highway by the construction of the railway across the same, the access to the houses of the Plaintiff was, notwithstanding the substitution of the deviation road, rendered less convenient for the occupiers, and many persons would be prevented from passing the same, and the houses had thereby been rendered less suitable for being used and occupied as shops, and the value of the houses had been greatly diminished. The Court of Queen's Bench gave judgment for the Plaintiff, without saying upon which of the heads of damage the Judges thought he was entitled to compensation. But upon error 7 HL 254 in the Exchequer Chamber, Chief Justice *Erle*, in delivering the opinion of the Court of Error that the judgment of the Court below ought to be affirmed, relied entirely upon the facts found by the umpire, that the value of the houses was depreciated because the highway was stopped up, and the easy access which before existed to them was taken away; that the houses were therefore injuriously affected within the words of the enactments referred to, and within the principle of law which governs cases of this description. This must therefore be classed with the preceding cases, 7 HL 253 where the house or land of the person claiming compensation was itself injuriously affected by their works. But the case of *Senior* v. *The Metropolitan Railway Company* (2) cannot be otherwise regarded than as precisely resembling the present. There the Plaintiff carried on the business of a tailor, selling ready-made clothes exhibited by him in a window of his shop in *Ray Street.* The company, in the execution of works (in the neighbourhood of those in the present case) stopped up a bridgeway leading from *Ray Street* to *Warner Street,* and blocked up the carriage way, and partially obstructed the footway of the street called *Coppice Row,* and, in consequence, *Ray Street* was less used and frequented as a thoroughfare, and the number of persons passing through the street was considerably diminished. During this period the Plaintiff's business fell off, principally in respect of the sale in the shop, and was less than it had been before the obstruction, and less than since it had been removed. Upon the inquiry before the sheriff, the jurymen found (as in this case) that no structural damage had been sustained, and stated, in delivering the verdict, that they assessed the compensation at the sum of £60 for the loss of trade by reason of such obstruction only, and not for any other matter or cause. The Barons of the Exchequer agreed that the Plaintiff was entitled to judgment for the £60, but apparently not exactly for the same reasons. The Chief Baron said that "loss of trade was an injury to the value of the land itself, and therefore the subject of compensation under the *Lands Clauses Consolidation Act.*" Baron *Bramwell* thought the case was decided by the case of *Chamberlain* v. *The West End of London and Crystal Palace Railway Company;* from which it appears to me to be distinguishable for the reason I have given. Baron *Channell,* adverting to an argument for the company that loss of trade, though some evidence of injury to the Plaintiff's interest, might be counterbalanced by other considerations, said, "Those considerations ought, at least, to have been stated in the case, so as to enable us to deal with them. The present unqualified statement shews that, in point of fact, the Plaintiff's premises were injuriously affected by the execution of the Defendants' works." Baron *Wilde* dealt only with the company's claim to a set-off by reason of the land being subsequently benefited, without adding a word upon the main question.

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(1) 2 B. & S. 605—617, 9 Jur NS 1051

(2) 2 H. & C. 258, 9 Jur NS 802

This case then, in which the judgments are not very satisfactory, is the only direct authority against the judgment of the Court of Exchequer Chamber under consideration. When I say the only authority, I have not forgotten the case of *Cameron* v.

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The Charing Cross Railway Company (1), where, upon a similar state of facts, the Court gave judgment for the Plaintiff. But the Chief Justice stated that the Court decided against the argument on the part of the company, on the ground that the matter had already undergone consideration in two Courts of co-ordinate jurisdiction, by whose judgment the Court was bound, the Chief Justice being evidently not satisfied with those decisions.

Thus the question stands upon the cases relied upon in the argument for the Plaintiff in Error; and if I am right in treating the decision in *Senior* v. *The Metropolitan Railway Company* as the only one which can be regarded as a direct authority in his favour, there is opposed to that decision the case of *Rex* v. *London Dock Company* (2), which is at least an equally strong authority the other way. The words of the Act upon which the compensation was claimed in that case appear to me not to make any substantial difference between the two cases. It was enacted that if any person should be injured in his estate or interest by the making of any such cut, sluice, bridge, road, or other work, such person should be compensated by the company for such injury. The company, under the powers of the Act, pulled down a number of houses, and made a cut which intercepted several thoroughfares, and obliged those who had previously used them to take circuitous routes. The tenants of a neighbouring public house demanded compensation for injury to their estate and interest, inasmuch as the pulling down of premises and the obstruction of access had diminished the direct and casual custom of the house, and also as the occupiers of houses were cut off from thoroughfares to the houses formerly used, and thereby the value of the premises to sell or let as a public house or shop, but not as a private residence, was lessened. Lord *Denman*, in delivering the judgment of the Court of King's Bench, said, "It is distinctly stated that it is only to sell or let as a public house or shop,—in other words, in respect of its goodwill,—that the pecuniary value of the house is diminished;" and added, "We are of opinion that the case of the complainants is not brought within any reasonable construction of the section. The inconvenience they complain of is not only one common in a greater or less degree to every inhabitant in the neighbourhood, but it is the necessary consequence of the lawful act done by the company. It was impossible to make the basin and cut, which it is the very object of the statute to enable the company to make, without destroying the neighbourhood, and stopping up these thoroughfares."

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(1) 16 C. B. (N.S.) 430; 10 Jur N S 635 (2) 5 Ad. & E. 163.

Such was the state of the authorities when the present case was decided, in which the four Judges of the Court of Queen's Bench, and two of the six Judges in the Court of Error, were opposed to the majority, that is, to the four Judges in the Exchequer Chamber.

The question entirely depends upon the correct construction of the compensation clauses of the *Lands Clauses* and *Railways Clauses Consolidation Acts.* I have already observed that the 6th section of the *Railways Clauses Act,* and the 68th section of the *Lands Clauses Act,* have the same object, and apply to the permanent works of the companies. The case was argued at your Lordships' bar both upon the 6th and 16th sections of the *Railways Clauses Act,* but in my opinion the 6th section is inapplicable. It relates to "owners and occupiers of, and all other persons interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof" (not *in the course of the* construction thereof); and the company is to make "full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, *as regards such lands,* of the powers vested in the company." This evidently applies to lands immediately affected by the permanent construction of the railway.

3CP88

The 16th section is the one which, if any, must apply to the case of the Plaintiff in Error. That section empowers the company, for the purpose of constructing the railway, to execute certain specified works, and contains a proviso that in the exercise of the powers granted "the company shall do as little damage as can be, and make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers." That the damage contemplated was not such a consequential damage as that on which the Plaintiff's claim is founded, is at least probable from the circumstances adverted to by Lord *Denman* in *Rex* v.

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London Dock Company (1); that as it was impossible to make the railway without obstructing, at least temporarily, the neighbourhood, and stopping up the thoroughfares, that necessary consequence must have been foreseen; and if it had been intended to give any compensation for it, it would have been clearly and distinctly expressed. And a critical examination of the words of the section leads to the conclusion that compensation for remote consequences resulting from a company's works was not intended. The words are, "shall do as little damage as can be," which, if applying to a consequential injury, would appear to limit the resulting damage to an immediate consequence, and not to extend to a remote one.

2CP646

The case of *The East and West India Docks and Birmingham Junction Railway* v. *Gattke* (2), before Lord *Truro*, may seem at first sight to be an authority for a party being entitled to compensation for the same sort of remote damage as that in the present case. There the directors of the company had commenced the works, and were, at the date of the filing of the bill, in the course of constructing their railway; and one of the grounds of complaint was, that the Defendant's customers had been compelled, by the obstruction occasioned by the works, to quit the side of the road upon which the Defendant's shop was situated before the works arrived at his shop, and to cross to the opposite side of the road in order to pass along; by reason whereof, during several weeks, he had sustained a great loss in his trade. The Lord Chancellor dissolved an injunction which had been granted by Vice-Chancellor *Wigram*, and allowed the Plaintiff in the action (the Defendant before him) to proceed to have the amount of compensation assessed by a jury. But, in addition to the above-mentioned ground of complaint, the Plaintiff in that case alleged that he had sustained injury in consequence of the dust and dirt occasioned by the works having damaged his goods; and he also alleged that he had been injuriously affected and injured by the company having stopped up a passage or lane along which he was entitled to a right of way or access to the entrance at the back of his premises, both of which were direct and not consequential injuries. And the Lord Chancellor, without distinguishing the heads of claim, said, "I see no reasonable doubt that if the Defendant has in fact sustained damage from the causes alleged, he is a person entitled to claim compensation, and that he is entitled to have the question submitted to a jury."

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(1) 5 Ad. & E. 163.

(2) 3 Mac. & G. 155; 6 Railw. Cas. 371.

Upon a review of all the authorities, and upon a consideration of the sections of the statutes relating to this subject, I have satisfied myself that the temporary obstruction of the highway, which prevented the free passage of persons along it, and so incidentally interrupted the resort to the Plaintiff's public house, would not have been the subject of an action at common law, as an individual injury sustained by the Plaintiff in Error, distinguishing his case from that of the rest of the public. That, therefore, he altogether fails to bring himself within the general principle upon which a claim to compensation under the Acts in question has been determined to depend; that upon the construction of the clauses on which his claim is rested, the 6th section of the *Railways Clauses Act*, and the 68th section of the *Lands Clauses Act*, are both inapplicable, as his damage arose from the temporary operations of the company, and not from their permanent works. And upon the 16th section of the *Railways Clauses Act*, which does apply to his case, his damage was not of such a nature as to entitle him to compensation; the interruption of persons who would have resorted to his house but for the obstruction of the highway, being a consequential injury to the Plaintiff in Error too remote to be within the provisions of that section.

I should therefore advise your Lordships to affirm the judgment of the Court of Exchequer Chamber.

LORD CRANWORTH :—

7HL267-8
268-9

My Lords, the jury in this case found that the Appellant was entitled to recover from the Respondents a sum of £100 in compensation for damages sustained by the exercise by them of the powers of their Act. The only question is, whether the facts stated in the special case as occasioning that damage are such as warranted the finding of the jury. And that depends on the true construction of two clauses of the *Railways Clauses Act* (8 & 9

Vict. c. 20), the 6th and 16th; and clause 68 of the *Lands Clauses Act* (8 & 9 Vict. c. 18), incorporated therewith.

The 6th section is prefaced by the words "and with respect to the construction of the railway and the works connected therewith, be it enacted as follows;" and this preface must be taken as relating to all the clauses which follow, up to and including sect. 29. After this preface, the 6th section provides, among other things, that the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken for the purpose of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands taken, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers conferred by the company's Act, to be ascertained in the manner there pointed out.

By the 16th section, the Defendants are empowered, for the purpose of constructing the railway, amongst other things, to make over any street such temporary bridges, and to divert the course of any streets or ways, as they may think proper, provided that there shall be made full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers. 3C P50

It is not disputed that the Defendants had properly and necessarily obstructed by hoardings the free passage across *Coppice Row*, and substituted the temporary bridge to enable foot passengers to cross over it; and it must be taken to be proved that by reason of this necessary obstruction, for the twenty months during which it existed, the Plaintiff had been deprived of the custom of passengers so as to occasion to him a loss of £100.

Is this a loss in respect of which the statute gives him a right to compensation? I think it is not. I have had considerable doubt in the case, but that is the conclusion at which I have eventually arrived.

It was argued that the 6th section does not refer to damage occasioned by obstructions of a temporary character necessarily made for the purpose of constructing the railway, but only to damage occasioned by the railway itself when completed. It was said that the case of such temporary damage as I have adverted to was provided for by the 16th and not by the 6th section. I do not

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think it material to determine by which of these sections the present case is governed. The only material difference in the language by which relief is given in the one section and in the other is, that in the 6th section relief is in terms confined to the case of lands *injuriously affected*, whereas in the 16th relief is given to all parties interested for all *damage* by them sustained by reason of the exercise of the powers thereby authorized. I cannot, however, believe that the damage intended to be compensated in the latter case is damage of a nature different from that contemplated in the former case. I cannot believe that the Legislature could have intended to give relief in respect of acts done for a short and limited period while works are in progress, and to refuse it in respect of the same acts when they are to have effect permanently. The damage contemplated in sect. 6 must, I think, be *damnum cum injuriâ*. It must be a damage occasioned by the land having been injuriously affected.

4HL180

2CP647

3CP.85

4QB [illegible]

7CP572

7 App Cas 265

4HL198

Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light, or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the Legislature.

The very existence of a railway must cause loss to many persons in its neighbourhood. Every inn or posting house at which post horses were kept suffered, as is well known, grievous loss by the first establishment of a railroad in its neighbourhood; in fact, the business of such a house was often utterly destroyed. But it was never contended that this was an injury to the house, under the 6th section, for which compensation could be demanded. The house sustained no injury, though the profits of the occupier were diminished or destroyed. Such a claim, if sustainable, would admit of no limit. The railroad would, it is true, chiefly affect the custom of posting houses near to it, but it would or might diminish the quantity of posting to an almost indefinite extent, and I can discover no limit to the claims which, on the doctrine asserted, might be successfully made.

Precisely the same observations may be made with reference to the present claim. The loss occasioned by the obstruction now under consideration may be greater to the Plaintiff than to others, but it affects more or less all the neighbourhood. He has no ground of complaint differing, save in degree, from that which might be made by all the inhabitants of houses in the part of the town where the works for forming the railway were carried on.

It must be admitted that there have been decisions on this subject not easily to be reconciled. The Plaintiff relied on the case of *Wilkes* v. *Hungerford Market Company* (1), and on other decisions following upon it. What was ultimately decided in that case was, that where a corporate body had, under lawful authority, obstructed a public thoroughfare, but had continued the obstruction beyond the proper and necessary time, a person living in a house bordering on the obstructed line might, in respect of that prolonged obstruction, sustain an action on the ground that, in consequence of the prolonged obstruction, passengers had been unable conveniently to pass by his door, and so that he had lost profit in his business. I confess that I have great difficulty in agreeing with that decision—a difficulty which, as I collect from the language of Sir *William Erle,* in delivering the judgment of the Exchequer Chamber in the case now before us, was felt by him, and the Judges who concurred with him. But it is enough to say that the relief to which the Plaintiff was there held to be entitled was not founded on any suggestion of injury to the land, or to the house—the sole ground on which there can be any title to relief in this case—but on an injury to the occupier which the Court must have held, in the language of Chief Justice *Tindal,* to have been the direct, necessary, natural, and immediate consequence of the obstruction.

A case bearing a much closer resemblance to that now before the House is that of *Rex* v. *The London Dock Company* (2). There the Act under which compensation was claimed authorized, in the usual way, the taking of lands, and the making of works necessary

(1) 2 Bing. N. C. 281. (2) 5 Ad. & E. 163.

for the undertaking; and the 89th section of the Act provided, that if any person having an interest in any houses, lands, or hereditaments, not less than that of a tenancy from year to year, should be injured in his said estate, or interest, by the making of any cut, sluice, bridge, road, or other work, every such person should be entitled to compensation for such injury, to be ascertained by a jury. The persons claiming compensation there were the owners and occupiers of a public house; and the Defendants, in the exercise of their powers, made several cuts and other works, materially obstructing the access to the public house, but not otherwise injuring it. The question whether a peremptory mandamus should issue, calling on the Defendants to issue a precept to the sheriff to summon a jury to assess the damage to the persons claiming compensation, depended on the question whether the damage complained of was an injury contemplated by the 89th section of the Act. The case was elaborately argued, and the Court, after time taken for consideration, held that there was no title to compensation; that the Act contemplated only direct injury occasioned by some positive act of the Defendants, as for instance, if they had weakened the foundation, darkened the lights, or obstructed the drains of the house.

I fully subscribe to that decision; and though, according to the language of the statute then under discussion, the compensation was to be given for injury to be occasioned to any person in his estate or interest in any lands or houses, and not, as in the present case, under the *Lands Clauses Act*, in consequence of his interest in any land being injuriously affected, yet the meaning of the Legislature in both cases seems to me to be the same.

This was certainly the view of your Lordships' House in the case of *The Caledonian Railway* v. *Ogilvy*, though the facts there were not precisely the same as those which now call for decision.

This being my opinion, I think that your Lordships ought to give judgment for the Defendants in Error.

LORD WESTBURY:—

My Lords, this case was heard by six Judges in the Court of Exchequer Chamber, on a writ of error from the Court of Queen's

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Bench. The six Judges differed in opinion, four being for reversing and two for affirming the judgment of the Court below. The four Judges in the Queen's Bench were unanimous. Deducting, therefore, the two from the six Judges in the Exchequer Chamber, the unanimous judgment of the four Judges in the Queen's Bench has been annulled by four Judges in the Exchequer Chamber. By the same majority the case of *Senior* v. *The Metropolitan Railway Company* (1), decided by the Court of Exchequer in 1863, and the case of *Cameron* v. *The Charing Cross Railway Company* (2), decided by the Court of Common Pleas in 1864 (which are the authorities for the judgment in the Court of Queen's Bench in the present case), have also been overruled. There are, therefore, the judicial opinions of ten or twelve Judges opposed to the present judgment, which is the judicial opinion of four.

1 C P D 394.

It is a matter of regret that our judicial institutions should admit of these anomalies. It is also painful to observe the number of conflicting decisions on the law of compensation by railway companies, which is the subject of the present appeal. It is impossible to reconcile these decisions by any sound distinctions, and the result is, that to a great extent they neutralise each other. Moreover, it is distressing to be told (as we are in the judgment before us) that the Court of Exchequer, in *Senior* v. *The Metropolitan Railway Company*, and the Court of Common Pleas, in *Cameron* v. *The Charing Cross Railway Company*, founded their judgments on the supposed effect of the judgment given by the Court of Exchequer Chamber, so recently as in the year 1863, in the case of *Chamberlain* v. *The London and Crystal Palace Railway Company* (3), but that both the Common Pleas and the Court of Exchequer did not understand the judgment on which they so relied. It is a striking example of the uncertainty of the law which rests on judicial decisions.

LC 317

I turn from the cases, therefore, to the Acts of Parliament; for the question depends on the true meaning of two or three sections, which do not appear to me to be hard to interpret. In the beginning of railway legislation, Parliament, whilst conferring on railway companies extraordinary powers over private property, felt the justice of imposing on the companies the obligation of making the

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(1) 2 H. & C. 258. 9 Jur NS 802

(2) 16 C. B. (N. S.) 430. 10 Jur NS 635

(3) 2 B. & S. 605-617. 9 Jur NS 1051

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fullest compensation for all property taken, and for all damage sustained by individuals, through the exercise of such powers. Care was used to provide that whenever damage was done to the property of an individual in the exercise of statutory powers, compensation should be given, although the powers might have been most properly and carefully exercised.

3CP86

It is material to observe that compensation under these statutes is given for damage resulting from lawful acts done by the companies in the exercise of their powers. Such acts are not injuries or grounds of action at law, although they may cause damage, and consequently give a right to compensation under the statute. When an act is done by a company in excess of its powers, or in a wanton and careless use of them, there is an injury for which the sufferer retains a remedy by an action at common law, or by suit in equity for an injunction; but things done by a company in the due execution of its powers are lawful, being duly authorized, and no action lies on account of them.

4QB362

When, therefore, the General Railway Acts use the term "injuriously affected," the word "injuriously" does not mean "wrongfully," or "unlawfully;" nor does it imply that compensation is limited to cases where the act done is such as but for the powers given would be a *tort* at common law. The words mean "damnously affected" only; and the consequential right to compensation is the creature of the statutes, to be ascertained and measured by the positive language of the enactments, and not by analogy to actions of *tort* or trespass. There is nothing in the statutes to warrant the position that there shall be no compensation where at common law there would have been no right of action.

In the 16th section of the *Railways Clauses Act*, two conditions are imposed upon companies respecting the exercise of their statutory powers. One is, that they shall do as little damage as can be; and the other, that they shall make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers. In an early stage of the judicial exposition of statutes of this description, Lord *Eldon* decided that they must be treated as contracts between the companies and the Legislature. And this is no doubt the true principle by which they should be construed and applied. Liability to make compensation, therefore, is the contract of the companies with the Legislature; and the right of the parties interested, that is, the parties sustaining loss, results from that contract, and the enactments which give effect to it. If this view be correct, it follows that it is a mistake to lay down, as I find done in several cases, and in effect in the judgment of the four Judges in this case, that the injury intended by the words "injuriously affected," must be one in respect of which, if there had been no statute enabling the company to do the act, an action would have lain for the injury at common law. Right to compensation is a title introduced by and dependent on the statutes; and it is only necessary to prove special damage to the occupant of the property occasioned by the construction of the railway or its incidental works, and that the complainant is a party interested within the meaning of that phrase in the statute.

I use the words "special damage" or individual particular loss, because I entirely concur with the doctrine that compensation cannot be claimed by an individual for damage which is sustained in common by all the subjects of the realm. Thus, if a public highway be diverted, or crossed on a level, by a railway, the inconvenience of having to wait whilst trains pass is common to all the public; and the benefit which it is considered results to the public from the railway is the only compensation. Persons dwelling in the neighbourhood may sustain this inconvenience more frequently than the rest of the public; but, if the inconvenience is to be regarded as compensated by the public convenience, it cannot be converted into a ground for compensation by reason of certain persons having to sustain the inconvenience more frequently than the rest of their fellow subjects.

I agree also with the distinction that has been taken between damage resulting from the railway when complete, or from the act of making it, and damage occasioned by the proper (not negligent) user of the railway when made. No claim can be made for loss resulting from the due user of a railway. Many persons, such as the proprietors of stage coaches, stage waggons, and the owners of posting inns, may be ruined by the user of the railway by the public, but they have no claim to compensation. Compensation is given by the statute only to individuals who, in respect of the ownership or occupancy of lands or tenements, sustain loss in or through the construction of the railway, or the execution of the incidental works.

This will appear on a short examination of the several enactments. By the 68th section of the *Lands Clauses Act* it is enacted that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works," &c., "such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit." By the interpretation clause the word "lands" includes messuages, tenements, and hereditaments; and this enactment, therefore, treats the owner of any interest in a messuage, which is damaged or injuriously affected by the execution of the works of a railway, as entitled to compensation.

It seems difficult to deny that the occupier of a public house, the value of which depends on its custom, has his interest in that house materially damaged by loss of custom. It may always have been used as a public house, and as such has been let to the occupier, who takes it and pays a high rent for it as a public house. When he took it, its value was ascertained and the rent fixed by reference to the custom it had; and it seems in the highest degree unreasonable to strip the house of its character, and of the use and purpose for which it has been constructed, fitted, and employed; and, having so done, to say that the interest of the occupier has sustained no damage because the building or structure has not been deteriorated. A man gives a rent of £100 per annum for a public house with good custom, long established in some much frequented thoroughfare, which house, if not used as a public house, would not be worth £50 per annum. Suppose, then, that the thoroughfare should be wholly or partially obstructed, and the custom of the house thereby diminished by one-half, is it consistent with common sense to say that the interest of the tenant in the house is not materially prejudiced? It is a fallacy, almost a mockery, to answer, "the custom is one thing, and the house another; and the injury is to the custom, not to the house." You cannot sever the custom from the house itself, or from the interest of the occupier; for the custom is the thing appertaining to the house, which gives it its special character, and constitutes its value to the occupier, and for which he pays in the high rent he has agreed to give. If you diminish the custom of a public house, you diminish its value either to let or sell, and therefore you deteriorate the public house and the interest of the tenant therein.

The true principle and the only rule is, that, in the inquiry whether the interest of the occupier of a messuage or building is damaged, that is, injuriously affected, you should estimate the value of the messuage or building to the occupier with reference to the use that he makes of it, and the beneficial purpose for which he has hired it and fitted it up, and for which he has paid and pays to the landlord a larger annual sum than the building *per se* would command; and if you find this use and enjoyment impaired by the works of the railway, you are bound to decide that the interest of the occupier is *pro tanto* damaged, that is, injuriously affected.

It is clear that if the railway company, in the exercise of its statutory power, took the public house entirely, it would have to pay for it according to its value as a public house, and the interest of the occupier therein would be estimated with reference to the value of the custom of the public house; but the same considerations by which the value of the entirety is estimated must apply, and be taken into account, when the question is, whether the value of the public house, during a certain period of time, has or has not been deteriorated. The trade or custom is a thing appertaining to the premises, and not to the person of the occupier; but all things appertaining to the premises are part of the premises, and included in the interest of the occupier, which word "interest" is a large and comprehensive word. I adopt the observation of the Court of Exchequer: "Loss of profits by loss of business is a loss to the goodwill of the premises, and the goodwill is part of the value of the property."

The language of the 6th section of the *Railways Clauses Act* is still more general and comprehensive than the words of the 68th section of the *Lands Clauses Consolidation Act,* to which these observations have been hitherto confined; for by this 6th section compensation is to be given to all owners or occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction

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thereof, for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by the *Railways Clauses Act*, or the special Act, or any Act incorporated therewith, vested in the company.

The 16th section is perhaps the most important; because it is under this section (being incorporated into their special Act), that the Defendants have executed the works, by reason of which the Plaintiff has, as regards his interest in the public house he occupies, suffered the damage complained of. By the 16th section, after conferring on the Defendants various powers to execute works incidental to the construction of the railway, it is provided that they shall make full satisfaction to all parties interested for all damage by them sustained by reason of the exercise of such powers. There is in this section a material alteration in the language used. The persons entitled are no longer described as the owners or occupiers of, or parties interested in, lands taken or injuriously affected, but as "parties interested;" and the word "compensation," which is perhaps more limited in meaning, is changed into the wide term "satisfaction."

I cannot at all agree with the remark that the reference made by this section to the manner of ascertaining the satisfaction described in other Acts, limits the meaning of the words "parties interested;" for the reference is merely for the purpose of incorporating into the 16th section the mode of procedure directed in the Acts referred to, viz., by arbitration, or inquisition by a jury; and has not the effect of controlling or altering the description of the subject matter or the parties, as contained in the section making the reference. The object of the reference is quite plain, namely, to embody the directions elsewhere given as to the mode of proceeding to ascertain the compensation to be paid.

In my opinion the term "parties interested" in this 16th section must mean parties sustaining, in respect of property, a special and individual loss by reason, or in consequence, of the accommodation works which the company is by this section empowered to construct, and therefore having an interest or right to require satisfaction for damage of which the works are the immediate or proximate cause.

It is singular that this 16th section of the *Railways Clauses Act*, and the alteration of the language employed therein, are not adverted to in the judgment of the Court of Exchequer Chamber. Perhaps it was tacitly assumed (for it is not so expressed) that the phrase " parties interested " was equivalent to " parties interested in lands injuriously affected." This, however, would be a strong, and, perhaps, unwarranted assumption; for the general rule is, that a deliberate change of expression must be taken *primâ facie* to import a change of intention. I do not, however, mean to rest my opinion in this case on the construction I have put on this 16th section. On the contrary, I am content to take the words " parties interested " as equivalent to the words in the 6th section of the *Railways Clauses Act*, and in the 68th section of the *Lands Clauses Consolidation Act*, viz., " owners or occupiers of, or parties having an interest in, lands injuriously affected."

The error in the decision (for so I must respectfully deem it to be) which has led to the judgment now appealed from, and to others upon which that judgment is founded, appears to me to have arisen entirely from the meaning attributed to those words " injuriously affected," which have been interpreted to mean " affected in such a manner as but for the statutes would constitute an injury at law, and would support an action for damages." But there is not, in my judgment, any warrant for so interpreting or paraphrasing the words, which, in my opinion, are plainly used in their ordinary and popular sense; for it is evident that lands affected in the proper exercise of the statutory powers cannot, in a legal sense, be said to be " injuriously affected."

For these reasons, which I have imperfectly stated, and which might be much more cogently enforced, I have the strongest opinion that the Plaintiff in the present case is the occupier of a messuage, which has (according to the true meaning of the statute) been injuriously affected by the works of this railway company; and I think, therefore, that judgment ought to be given for the Plaintiff.

Judgment of the Exchequer Chamber affirmed, with costs.

Lords' Journals, 16th May, 1867.

Attorney for Plaintiff in Error: *W. G. Morris.*
Attorneys for Defendants in Error: *Burchells.*

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July 4, 5.

THE REV. CHARLES BINGHAM WALSH AND J. T. WALKER . . . . { PLAINTIFFS IN ERROR;

AND

GEORGE TRIMMER . . . . { DEFENDANT IN ERROR.

6 C.P. 463.
— 603-4,

Tithes—Commutations—Hop-grounds—New Cultivation—6 & 7 Will. 4, c. 71.—Costs.

The commutation of tithes does not mean merely the commutation of existing tithes into a rent-charge settled at the moment, but the commutation of the right to take the tithes into the right to take a rent-charge in lieu of them. Consequently, where lands, at the time of a commutation and apportionment, were not liable to, and did not pay, any tithes; but such lands were afterwards inclosed, and were cultivated as hop grounds, they became liable, under the 6 & 7 Will. 4, c. 71, s. 42, to pay the extraordinary charge fixed by the Commissioners to be paid by lands in the particular district cultivated as hop grounds.

A commutation of tithes took place in the parish of *B.*, and a valuation and apportionment were duly declared, and the extraordinary charge for hop cultivation fixed. In that parish was a large piece of waste land which at that time did not pay tithes. Some years afterwards this waste land was inclosed, and it was cultivated as a hop garden:—

Held (reversing the judgment of the Exchequer Chamber, and restoring the judgment of the Queen's Bench), that it thereby became liable to the extraordinary charge fixed by the Commissioners upon lands in that parish cultivated as hop grounds.

The judgment of the Exchequer Chamber was reversed: the judgment of the Court of Queen's Bench was affirmed with costs.

THIS was an appeal against a judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench, given on a special case stated, without pleadings, under the provisions of the *Common Law Procedure Act*, 1852 (15 & 16 Vict. c. 76, s. 179).

Mr. *Walsh* was the vicar of *Binstead*, in *Hampshire*. *Walker* had acted as his bailiff. Mr. *Trimmer* was the occupier of land in that parish.

The case set forth in substance, that in the year 1841 the tithes of the parish were commuted under the *Tithe Commutation Act*, 6 & 7 Will. 4, c. 71. The Tithe Commissioners found that

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the estimated quantity of all the lands in the parish subject to the payment of tithes, amounted to 4886A. 16P., cultivated as therein stated. Of these, 136 acres were then cultivated as hop grounds, and there were 828A. 30P. of common or waste lands. The Commissioner awarded that the annual sum of £209, by way of ordinary rent-charge, should be paid to the vicar instead of all the small tithes, other than the tithes of hops, arising from all the lands of the parish (except a certain district called *Neatham*, which it is not necessary to refer to as it was tithe free), and that the lands which were then, or might be thereafter, cultivated with hops, should be charged with and pay the additional sum of £1 per imperial acre by way of extraordinary rent-charge, and a proportionate sum for any quantity of land less than an acre, so long as they should be so cultivated. The amount thus settled to be, at that time, payable to the vicar, consisted of two sums, £209 11*s.* 1*d.* for the commutation on the ordinary tithes, and £136 for the extraordinary charge on the 136 acres of hops, at £1 an acre. No ordinary rent-charge whatever was apportioned upon the 828A. 30P. of common or waste lands, but they were included with other lands in the apportionment and schedule, under the following description:—"The forest of *Alice Holt*, 2658A. 3R. 3P.," and no sum payable as rent-charge was affixed to the description. In the year 1854, part of the forest of *Alice Holt* was inclosed. Of this inclosure the lands as to which the present question arose formed part. The award made by the valuer in the matter of that inclosure was confirmed on the 29th of July, 1857. In that inclosure award there was no mention of tithes. In the year 1855 *Trimmer* began cultivating his part of the inclosure with hops. *Walsh* claimed to be entitled to the extraordinary rent-charge in respect of such cultivation. In 1860 he made a formal demand on *Trimmer* for payment of this charge, and payment being refused he destrained, by his bailiff *Walker*, for the amount; *Trimmer* thereupon brought replevin, and, by order, a case was stated for the opinion of the Court. The question for decision was whether *Trimmer's* land was, under the circumstances stated, liable to pay the extraordinary tithe rent-charge for hops.

The Court of Queen's Bench in Michaelmas Term, 1862, (*diss.*

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Mr. Justice *Wightman*), gave judgment in the affirmative.(a) On appeal the Court of Exchequer Chamber, consisting of *Erle*, C.J., *Pollock*, C.B., *Willes* and *Keating*, JJ., and *Bramwell* and *Channell*, BB., reversed this decision (1). The case was then brought up on error to this House.

The Judges were summoned, and Mr. Baron *Martin*, Mr. Justice *Willes*, Mr. Justice *Blackburn*, Mr. Baron *Pigott*, and Mr. Justice *Lush*, attended.

Sir *R. Palmer*, Q.C., and Mr. *Mellish*, Q.C. (Mr. *F. M. White* was with them) for the Plaintiffs in Error:—

The question here turns on the meaning to be given to the 42nd section of the 6 & 7 Will. 4, c. 71. It is submitted that, under the proper interpretation of that section (2), the land of the

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(1) 32 L. J. (Q. B.) 20—364; 4 B. & S. 18—40.

(2) 6 & 7 Will. 4, c. 71, s. 42: "Be it enacted, that the amount which shall be charged by any such apportionment, as hereafter provided, upon any hop grounds or market gardens, in any district so to be assigned, shall be distinguished into two parts, which shall be called the ordinary charge, and the extraordinary charge; and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers, or Commissioners, or Assistant Commissioner, by whom the apportionment shall be made as aforesaid; and all lands whereof the tithes shall have been commuted under this Act, and which shall cease to be cultivated as hop grounds or market gardens, at any time after such commutation, shall be charged, after the 31st of December next following such change of cultivation, only with the ordinary charge upon such lands; and all lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop grounds or market gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre equal to the extraordinary charge upon hop grounds or market gardens respectively in that district: Provided always, that no such additional amount shall be charged or payable during the first year, and half only of such additional amount during the second year of such new cultivation; and an additional rent-charge by way of extraordinary charge upon hop grounds and market gardens, newly cultivated as such, beyond the limits of every district in which any extraordinary charge for hop grounds or market gardens respectively shall have been distinguished as aforesaid at the time of the commutation, shall be charged by the Commissioners at the time of such new cultivation, upon the request of any person interested therein, if such new cultivation shall have taken place during the continuance of the commission of the said Commissioners, and after the expiration of the commission shall be charged in such manner and by such authority as Parliament shall direct, and shall be payable and re-

(a) 9 Jur N S 381

Defendant in Error, brought into cultivation as a hop garden after the date of the commutation of the tithes in the parish, became liable to the extraordinary rent-charge as such, although, when that commutation was made it was not land which had paid any tithes. All land is properly liable to tithes—when the land is not cultivated its liability exists, but, because it produces nothing of value, that liability cannot be, or is not, enforced. But the liability remains. When the land is brought into cultivation the means of enforcing the liability arise. If no commutation has taken place tithes are, in respect of its produce, payable; if there has been a commutation, then rent-charge is payable in lieu of tithes. Apportionment was never meant to fix a limit to the titheowner's right in respect of his claim to a rent-charge, it merely pointed out the districts of the parish which, at the time of the commutation, were actually paying tithes, and apportioned the rent-charge among them.

The word *additional*, in the 42nd section, has been mistaken in the Court below, its real meaning refers to the quality of the charge, it is, in its amount, additional to the amount of the ordinary rent-charge. It does not mean a new but an increased charge.

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coverable in like manner, and subject to the same incidents in all respects, as an extraordinary charge charged upon any hop grounds or market gardens at the time of the commutation."

The 67th section was also much referred to. It is as follows:—"Be it enacted, that from the 1st of January next following the confirmation of every such apportionment, the lands of the said parish shall be absolutely discharged from the payment of all tithes, and instead thereof there shall be payable thenceforth, to the person in that behalf mentioned in the said apportionment, a sum of money equal in value, according to the prices ascertained by the then next preceding advertisement, to the quantity of wheat, barley, and oats, respectively mentioned therein to be payable instead of the said tithes, in the nature of a rent-charge issuing out of the lands charged therewith:" . . . "Provided always that the rent-charge which shall be apportioned upon any lands in the said parish which, during any part of the said period of seven years preceding Christmas, 1835, were exempted from tithes by reason of having been inclosed under any Act of Parliament, or converted from barren heath or waste ground, shall be payable for the first time on the 1st day of July, or the 1st day of January, next following the confirmation of the appointment which shall be nearest to the time at which tithes were or would have become payable for the first time in respect of the said lands, if no commutation had taken place."

This additional charge is not to be made in respect of ordinary cultivation, but it is to be made in respect of extraordinary cultivation, that is, garden ground and hop gardens. Had these lands been brought into cultivation as hop gardens before the statute, they would have paid tithe in kind; they are now freed from that liability to tithes, and must pay the extraordinary charge in lieu of tithes fixed on hop grounds by the Commissioner. The statute dealt fairly between the titheowner and the landowner; it did not extinguish the right of the former to receive a payment from the land, but, in order to encourage cultivation, it fixed a rent-charge on the land, instead of keeping it liable to a tithe which, in some cases, might have rendered profit from the land impossible, and so might have discouraged cultivation. That was the general policy of the statute, and the words of the 42nd section are not in contradiction to that policy. On the contrary, if the relative rights of the two parties are considered, they fully carry it into effect. [Several other sections of the 6 & 7 Will. 4, and various sections in the other Tithe Acts, were referred to in illustration of this argument.]

Mr. *Coleridge*, Q.C., and Mr. *Garth*, Q.C., for the Defendant in Error:—

The object of the *Tithe Commutation Act* was to fix for ever the amount of the outgoings from the land payable in favour of the church. The allowance of the present claim is certainly in derogation of that object.

The natural meaning of the words used in the statute is that which has been put on them by the Court of Exchequer Chamber. A parish was liable to tithes, but only in respect of such lands as were under cultivation. That liability to tithes was commuted into a rent-charge, which was apportioned by the valuers and Commissioners. There could be no commutation where no liability to tithes existed. If, in the lands on which the commutation and apportionment took effect, those which were then cultivated for ordinary crops were brought into cultivation for hops, an additional rent-charge was declared to attach upon them. The opposite result took place where lands then cultivated for hops were brought into ordinary cultivation. "Additional" meant an added rent-charge—a something added to what was paid before. That must be so, even if the meaning of an increased rent-charge was given to it. There was no intention to create an entirely new liability. That would not be authorizing an additional payment, but creating a payment for the first time. The titheowner was treated fairly—there was an equalization of advantage and disadvantage. He received this particular benefit, that whereas he would, before the statute, have lost his tithe altogether if the land was built on and not cultivated, he would, now that the rent-charge was fixed on it, obtain that rent though the whole land might be covered with buildings, for it was a settled charge fixed upon the land of the parish. Surely the Act did not mean to give him that advantage, and, at the same time, give him another, namely, that he should receive tithe, or its equivalent in the shape of a rent-charge, upon lands in the parish which had never before been liable to tithe. In the 12th section, the Act put this interpretation on the word "tithes": "It shall mean and include all uncommuted tithes, portions and parcels of tithes, and all moduses, compositions, real, and prescriptive, and customary payments." The argument on the other side assumed a meaning for the word entirely different from that which was there given it. [THE LORD CHANCELLOR:—The word may mean liability as well as the produce of that liability.] Not so, according to the statute. By the 67th section, the lands of the parish are absolutely discharged from all tithes after the apportionment has been made, and, instead of the tithes, "a sum of money, in the nature of a rent-charge issuing out of the lands charged therewith"—that is, formerly charged with tithes—is to be paid. That shews that where no tithe before existed, no rent-charge is to be payable. In like manner, the 50th section provides that the Commissioners are to award the total sum to be paid for the tithes of the parish, and the 58th section directs the whole rent-charge to be apportioned upon the lands, or according to the acreable rates of particular lands, which shews that what was then done was intended to be final. The 3 Vict. c. 15, s. 18, empowers the parties to a parochial agreement to agree upon, or the Commissioners to declare, the amount of extraordinary charge payable in respect of hop grounds—a power which supposes that the amount may then be ascertained and fixed. And the 19th section declares that it shall "not be necessary to distinguish, in any apportionment, the amount of extraordinary rent-charge to be charged upon the lands of each individual landowner which shall be cultivated as hop ground." Yet it would have been necessary so to distinguish the amount if the sum chargeable in respect of such cultivation could not then be fixed once for all. The statute never could have meant that, if these lands had now been brought into wheat cultivation, they should not pay, but that, being brought into hop cultivation, they should pay. These lands were not included in the apportionment because they did not pay tithes, and they are discharged for ever, under the 67th section, unless the 42nd section can be treated as fixing the charge upon them, and the later section, the 67th, shall be declared to have no effect on its provisions.

Mr. *Mellish* replied:—

The 50th and 58th sections of the statute refer to what is to be done between the landowners and the valuers and Commissioners, but do not affect the rights of the titheowners. The 67th section does not in the least interfere with the provisions of the 42nd section, which clearly makes land newly brought into cultivation as hop ground liable to the acreage rate declared by the Commissioners.

At the conclusion of the argument the Lord Chancellor put the following question to the Judges:—

"Whether under the circumstances stated in the special case the Plaintiff's land is liable to pay the extraordinary tithe rent-charge for hops?"

The Judges retired, and, after a short time, returned into the House, when,

Mr. BARON MARTIN delivered their unanimous opinion as follows:—

We think the more reasonable construction of the 42nd section of 6 & 7 Will. 4, c. 71, read by the light of the 50th, 58th, and 67th sections of the same Act, and the 18th section of 3 Vict.

c. 15, is, that in all cases where land was under liability to tithe in kind, actual or potential, and such liability was discharged, and a rent-charge substituted, whether directly issuing out of that land as a separate parcel, or out of other land to which it has for convenience, or by arrangement, been attributed in the apportionment, the tithe of all and every part of the land which before was titheable was commuted, and that upon any part of it being newly cultivated as hop ground, or market garden, it became liable to be charged with the additional amount, that is to say, additional to that rent-charge which was imposed either directly upon the particular land, or upon other land, as the consideration for its discharge from tithe in kind. We, therefore, answer your Lordships' question in the affirmative.

THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, the Courts below having differed in their judgment it is a satisfaction to me that the view which I have taken of the case is supported by the unanimous opinion of the learned Judges of whose advice and assistance your Lordships have the benefit to-day.

The question is a very short one, depending upon a few words of the 42nd section of the 6 & 7 Will. 4, c. 71:—"And all lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop grounds or market gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre equal to the extraordinary charge per acre upon hop grounds or market gardens respectively, in that district."

Upon the commutation of the tithes of the parish of *Binstead*, of which the Defendant, Mr. *Walsh*, is the vicar, the Commissioner awarded "that the annual sum of £209, by way of ordinary rent-charge shall be paid to the vicar of the parish of *Binstead* for the time being, instead of all the small tithes, other than tithe of hops, arising from all the lands of the said parish subject to tithes." The Commissioner assigned a district in the parish within which an extraordinary rent-charge in lieu of hop tithe should prevail, and he awarded, "that the lands in the district which then were or might be thereafter cultivated with hops, should be charged with and pay the additional sum of £1 per imperial acre, by way of extraordinary rent-charge, and a proportional sum for any quantity of land less than an acre so long as they should be so cultivated."

The lands of the Plaintiff in question were situated within this district. The rent-charge of £209, was not apportioned upon any part of these lands which at the time of the commutation were common or waste lands. After the award the Plaintiff inclosed and cultivated the land in question as a hop ground. The Defendant, the vicar, claimed from the Plaintiff the additional sum of £1 per acre, by way of extraordinary rent-charge. The Plaintiff refused to pay, upon which the vicar distrained; and the Plaintiff brought his action of replevin. A majority of the Court of Queen's Bench held that the Plaintiff's land was liable to the extraordinary charge of £1 per acre; but the Court of Exchequer Chamber reversed this decision, holding that as no tithes were payable in respect of the lands at the time of the commutation, they could not afterwards be charged under the 42nd section.

The argument upon which this judgment proceeded appears to have been, that as at the time of the commutation the lands yielded no tithe, it could not be predicated that the tithes of them had been "commuted under the Act," and that no part of the rent-charge of £209 having been ascertained and awarded in respect of these lands, or apportioned upon them, it was not possible to charge them with an *additional* rent-charge.

The judgment of the Court of Exchequer Chamber appears to me, with great respect, to be founded upon a narrow view of the Act. Under the *Tithe Commutation Act* what is it that is commuted? Not the actual tithes which, from the present cultivation of the lands, happen at the time of the commutation to be receivable, but the right of the parson to receive tithes from the lands is to be converted into a perpetual rent-charge. This perpetual rent-charge is to be substituted for all present and future right to the tithes.

It was argued that the words "additional amount of rent-charge" could only mean additional to a charge already upon the lands; and that where there was no apportionment of rent-charge upon the lands no addition could be made in the proper sense of that term. But the Legislature seems to have supposed that the rent-charge would be laid upon the lands generally within the parish, except in cases under the 38th section, where the rent-charge might be specially apportioned, and it apparently used the words "an additional amount of rent-charge" in the sense of "in addition to the rent-charge" for which the tithes should be commuted.

The 58th section, to which I have just referred, furnishes a good illustration of the propriety of the construction which I have adopted. By that section, upon the request of the landowner, and with the consent of the person entitled to the rent-charge, the whole rent-charge may be apportioned specially upon certain closes or portions of the lands to the exclusion of others. Those excluded portions may be lands actually paying tithes, and may be within an assigned hop district; and yet, according to the argument, because no part of the rent-charge would be apportioned upon them, there could be no additional amount of rent-charge in respect of these lands if they were afterwards cultivated as hop gardens.

For these reasons I think that the view taken of the Act by the Court of Queen's Bench was correct, and that the judgment of the Court of Exchequer Chamber reversing that judgment ought itself to be reversed.

LORD CRANWORTH:—

My Lords, I shall only add a word to what has fallen from my noble and learned friend. The question seems to me to turn entirely upon those three or four lines in the 42nd section: "And all lands whereof the tithes shall have been commuted under this Act." Those were lands the tithes whereof were commuted under the Act because either actually, or (as it has been put by the learned Judges in their opinion) potentially, they were liable to tithes in kind, "and which shall cease to be cultivated as market gardens," shall be charged only with the ordinary charge upon such lands; "and all lands in any such district which shall be newly cultivated as hop grounds" (that is the case here) "shall be charged with an additional amount of rent-charge per imperial acre, equal to the extraordinary charge per acre upon hop grounds in that district." It seems to me that these lands come precisely within that definition, and on that very short ground I express my entire concurrence in the judgment of my noble and learned friend.

LORD WESTBURY:—

My Lords, I regret very much that the decision of the Court of Exchequer Chamber has rendered necessary this proceeding in error. Much was said in the judgment about the policy of the Act. Now, the policy of the Act appears to be reasonable and plain. At the time when the *Tithe Commutation Act* was introduced the Church pressed very much on the consideration of the Legislature that there were districts where there had already prevailed, or had begun to prevail, a special mode of cultivation, the tithe of which was more valuable than the tithe of lands under ordinary cultivation; and that argument was so far of effect that the Legislature introduced into the Act provisions enabling the Commissioner where he found, in a particular place, a special mode of cultivation, such as that of fruit trees, or hops, and the like, to assign a district within which, if at any future time other lands should be brought into a similar mode of specially profitable cultivation, a definite sum of money should be payable, by way of additional rent-charge, in respect of the tithes of the lands so brought into cultivation.

That appears to have been the case with regard to the present district. A district was assigned by the Commissioner, and an additional rent-charge of £1 per acre was fixed for land cultivated with hops; and the lands in question were included in that district, being at that time common or forest lands. There can be no possibility of doubt that these lands, although at the time of the apportionment they yielded no tithe, and although they had no part of the ordinary rent-charge attributed to them in the apportionment, were yet lands which, in the eye of the law, were capable of yielding tithe—all lands, with some peculiar exceptions, being *primâ facie* subject to tithe. The tithe of land is a familiar phrase, including (as the learned Judges have pointed out in their opinion) not only tithes *de facto* taken and enjoyed, but also all future tithes that may arise. There is, in reality, therefore, with regard to the construction of the 42nd section, but one inquiry to be made, and that is, whether the tithes of the lands in question can be properly said to have been commuted by virtue of the award under the *Commutation Act.* Of that there can be no doubt. The lands in question are certainly, by force of the commutation, exempt from tithe. If so, they are brought within the expressions contained in the 42nd section, and you can affirm of them that they are lands the tithes whereof have been commuted under the Acts. But the moment they are put in that category, and are liable to have that affirmation made with regard to them, they become subject *in futuro* to the extraordinary charge upon their being brought under hop cultivation, provided they are found within the district assigned by the Commissioner. The matter appears to me too plain for argument. The commutation does not in the least degree depend on the apportionment; the commutation is effected by the words of the Act; the apportionment is a future matter not at all adding to the effect of the exemption by the force of the commutation. Nor does the effect of the commutation depend on the apportionment.

I have no doubt, therefore, that the opinion of the learned Judges here is perfectly correct, and I entirely concur in the judgment proposed by my noble and learned friend, the Lord Chancellor.

Sir *Roundell Palmer* :—Perhaps your Lordships will excuse me if I take the liberty of reminding you that this writ of error comes under the *Common Law Procedure Act,* which directs that, in case of reversal, the judgment is to be given which ought to have been given by the Court below; and therefore, I presume, in point of form, that your Lordships, in reversing the judgment of the Court of Exchequer Chamber, will affirm, with costs, the judgment of the Court of Queen's Bench.

Mr. *Garth* :—My Lords, perhaps you will allow me to observe that, although this was a case stated under the *Common Law Procedure Act* of 1852, it came before the Court of Queen's Bench as a special case; and there is a provision in the 17 & 18 Vict. c. 125, s. 32 (1854), that error may be brought upon a special case, in the same manner as it had been before brought upon a special verdict. I apprehend, therefore, this is more in the nature of a writ of error upon a special verdict in the old form.

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THE LORD CHANCELLOR:—I think the way to dispose of it will be, that the judgment of the Court of Exchequer Chamber be reversed, and that the judgment of the Court of Queen's Bench be affirmed with costs.

Judgment of the Court of Exchequer Chamber reversed; and Judgment of the Court of Queen's Bench affirmed with costs below.

Lords' Journals, 5th July, 1867.

Attorneys for the Plaintiffs in Error: *W. H. Withall.*
Attorneys for the Defendants in Error: *Johnson & Wetherall.*

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June 4, 6.

DANIEL THORP . . . . APPELLANT;
AND
JOHN W. BROWNE . . . . RESPONDENT.

Registry Acts (Ireland)—Affidavit—Name and Place of Abode of Debtor.

LR 7 QB 159, 160
163,
4 QBD 604

Where there is, in an affidavit made under the 13 & 14 Vict. c. 29, s. 6, an insufficient description of the place of abode of a judgment debtor, the supplemental affidavit authorized, under the 21 & 22 Vict. c. 105, to be filed by the creditor, will not cure that defect, the object of the latter statute being to allow a verification to be supplied as to facts already sufficiently stated in the first affidavit, but not properly so verified.

T. had obtained a judgment against *B.*, and filed an affidavit under the former statute, in which he stated (heading the affidavit with the name of the cause) that he had obtained "a judgment in the Court of Exchequer in *Ireland* against the Defendant in this cause, by the name and description of *G. H. B.*, formerly of *Ballina Park*, in the county of *Wexford*, and now of of the city of *Dublin*, Esquire, for" &c., besides costs:—

Held, that the affidavit was sufficient within the provisions of the 13 & 14 Vict. c. 29, to constitute a good statutory mortgage on the debtor's estate.

THIS was an appeal against an order of the Master of the Rolls in *Ireland*, by which an order made by Master *Fitzgibbon* had been affirmed. The question at issue was, whether a certain judgment obtained on the 18th of December, 1850, by the Appellant, against *George Humphreys Browne*, the Respondent's father, for a sum of £4400, had been duly registered so as to constitute a good statutory mortgage on the debtor's estate. This question arose on the provisions of a statute (13 & 14 Vict. c. 29) passed in July of the same year, 1850. The 6th section, on which this question arose, is very long, but the part which immediately gave rise to the question consists of one single sentence, and is in these terms:—The judgment creditor is required to file "an affidavit stating the name or title of the cause or matter, and the Court in which such judgment, decree, order, or rule, has been entered up, obtained, or made, and the date of such judgment, decree, order, or rule, and the names, and the usual or last known place of abode, and the title, trade, or profession of the Plaintiff (if there be such), and of the Defendant or person whose estate is intended to be affected by the registration, as hereinafter mentioned, of such affidavit, and the amount of the debt, damages, costs, or moneys, recovered or ordered to be paid."

The 7th section gave to a registration made according to these enactments, the force of operating to transfer to, and vest in, the judgment creditor "the lands, tenements, and hereditaments mentioned therein, for all the estate and interest of which the debtor mentioned in such affidavit shall, at the time of such registration, be seised or possessed at Law or in Equity, or might at such time create by virtue of any disposing power which he might then, without the assent of any other person, exercise for his own benefit, but subject to redemption on payment of the money owing on the judgment, decree, order, or rule, mentioned in such affidavit."

On the 7th of January, 1851, the Appellant filed the following affidavit in the Court of Exchequer in *Ireland*:—

"*Daniel Thorp*, of *Kildare Street*, in the city of *Dublin*, attorney-at-law	Plaintiff;
George Humphreys Browne, formerly of *Ballina Park*, in the county of *Wexford*, and now of the city of *Dublin*, Esq.	Defendant.

"In the Court of Exchequer:

"*Daniel Thorp*, of *Kildare Street*, in the county of the city of *Dublin*, aged forty years and upwards, the Plaintiff in this cause, maketh oath and saith, that he, this deponent, by the name and description of *Daniel Thorp*, of No. 39, *Kildare Street, Dublin*, attorney-at-law, did, on the 18th day of December, in the year of Our Lord, 1850, and in or as of Michaelmas Term in the said year, obtain a judgment in Her Majesty's Court of Exchequer in *Ireland* against the Defendant in this cause, by the name and description of *George Humphreys Browne*, formerly of *Ballina Park*, in the county of *Wexford*, and now of the city of *Dublin*, Esq., for the sum of £4400 sterling, besides £10. 1*s*. 10*d*. for costs, as by the records of the said Court may fully appear." The affidavit then went on to describe the estates of which *G. H. Browne* was seised, or over which he had a disposing power, and concluded by alleging that "the said judgment is still in full force and vigour."

In the year 1857 another Act, 21 & 22 Vict. c. 105, was passed for the purpose of amending the previous Act. The new statute contained this recital: "And whereas, for the purpose of registration under the said recited Act, a form of affidavit has been generally adopted, which purports to verify on oath the seisin or possession, and the description of the lands to be affected by such registration, in manner directed by the said recited Act, but in which the name or title of the cause or matter, and the Court in which such judgment, decree, order, or rule, has been entered up, obtained, or made, and the date of such judgment, decree, order, or rule, and the names, and the usual or last known place of abode, and the title or profession of the Plaintiff (if there be such), and of the Defendant or person whose estate is intended to be affected by the registration of such affidavit, and the amount of the debt, damages, costs, or moneys recovered, or ordered to be paid by such judgment, decree, order, or rule, or some one or more of such facts, appear to have been stated, recited, or referred to on the face of such affidavit without being covered by a verification on oath," in consequence of which the validity of affidavits in that form had been questioned: therefore it was enacted "That wherever it shall appear that any of such facts appear, or have been so stated, recited, or referred to, on the document so registered as an affidavit under the said recited Act, before the passing of this Act, but are not included in or under the verification on oath therein contained," it shall be lawful for the creditor to file a supplemental

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affidavit, verifying such facts so recited or referred to. "Provided that in every supplemental affidavit the description, residence, or last known place of abode of the Defendant, as then known or existing, shall be stated." Such statement to be taken as if verified in the original affidavit, "and such supplemental affidavit when so registered shall have the like operation and effect as if the facts so verified by same had been verified on oath in such original affidavit."

The 2nd section contained the following proviso: "Provided that nothing herein contained shall operate to give validity to any registration under the said recited Act, where the original affidavit filed for such purpose shall have omitted to verify the fact of the seisin or possession, or the description of the lands against which the registration was intended to operate, in the manner directed by the said recited Act."

On the 1st of July, 1859, the Appellant filed a supplemental affidavit under this new Act, the material part of which was in these words, "Deponent saith his name is *Daniel Thorp*, and that he is the Plaintiff who obtained said judgment, and that said judgment is still in full force, virtue, and effect in law, unreversed and unsatisfied, and that deponent at the time of obtaining same was, and still is, a solicitor and attorney-at-law, and that his place of abode was then, and still is, situate at No. 39, *Kildare Street*, in the county of the city of *Dublin*. And deponent saith that the name of the Defendant, the person whose estate is intended to be affected by the registration of such affidavit, is *George Humphreys Browne*, that the said *George Humphreys Browne* then was, and now is, without trade or profession, and that his usual and proper title is, and then was, Esquire, that his usual place of abode, shortly previous to the obtaining of the said judgment and the swearing of the said affidavit by deponent, was *Ballina Park*, in the county of *Wexford*, and that the *Four Courts' Marshelsea*, *Dublin*, was his place of abode at the time of obtaining such judgment and swearing said affidavit by deponent, and is now his usual place of abode last known to the deponent."

The affidavit was duly registered, and shortly afterwards *George Humphreys Browne* died, leaving the Respondent his eldest son and heir-at-law. On the 29th of October, 1862, a Petition was filed in

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the Landed Estates Court, "In the Matter of the Estate of *John Wellington Browne* (the Respondent), Owner, *William Magill* and *David Gaussen*, Petitioners;" praying for a sale of the lands against which the Appellant's judgment had been registered. On the 19th of December, 1862, an order was made, but the execution of it was delayed. On the 16th of June, 1864, the Appellant filed his Petition in the Court of Chancery in *Ireland*, praying that the said judgment debts and mortgages might be declared well charged upon the said lands and hereditaments. An order was made referring it to the Master *Fitzgibbon* to inquire into and consider the matter of the said Petition, and to proceed therein pursuant to the statute. On the 3rd of December, 1864, the Master made his order, declaring that the judgment was not validly made a charge upon the said lands. On appeal, the Master of the Rolls, on the 20th of April, 1865, confirmed the Master's order, and refused the Appellant's appeal with costs (1).

This appeal was then brought.

Mr. *Coleridge*, Q.C., and Mr. *D. Roberton Blaine*, for the Appellant:—

The affidavit here was sufficient; it fulfilled the real object of the statute, which was to place on the registry information intelligible to all who might be concerned to seek for it. The Master of the Rolls in this case did not act on his own opinion, but followed what he deemed to be a binding authority: he said (2), "The affidavit only states by way of recital the name, and the usual or last place of abode, &c. of the Defendant in the said judgment, and the Court of Common Pleas decided, in the case of *McDowell* v. *Wheatly* (3), that a statement by way of recital of the matters required by the said Act of Parliament to be stated was insufficient." The description here given was not by way of recital—it was in the form of positive allegation—that a judgment had been obtained against *George Humphreys Browne*, the Defendant in the cause, whose name and description had been given in the heading of the affidavit, and were then repeated. The case relied on by the Master of the Rolls is, therefore, inapplicable. Another case referred to, and acted on by His Honour, *In re Francis Fitzgerald's Estate* (1) (though he distinctly expressed his own dissent from it), is also inapplicable, for the description there was very vague. It was this: "Late of the town of *Galway*, but now of the county of *Dublin*," there being no street given in *Galway*, and not a parish, nor any particular and known district referred to in the county of *Dublin*. Of course, therefore, a verification of so defective a description was valueless. But there is another case, of a different *Fitzgerald*, reported in the same volume, *In re Thomas Joseph Fitzgerald* (2), which is in point, and which shews the affidavit here to be sufficient. There the affidavit was headed "*John Magrath*, of *Doon*, in the county of *Waterford*, farmer, Plaintiff; *Thomas Joseph Fitzgerald*, of *Ballinaparka*, in the county of *Waterford*, Esq., Defendant;" and it went on to state that "*J. M.*, of, &c." describing him as before, "the Plaintiff in this cause, did obtain a judgment in &c., against the Defendant in this cause by the name and description of," and then the description of the Defendant at the head of the affidavit was repeated and this was held quite sufficient to satisfy the requirements of the statute.

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(1) 16 Ir. Ch. Rep. (N. S.) 365.

(2) Ibid. 369.

(3) 7 Ir. Com. Law Rep. (N. S.) 562.

The English cases which may be cited in analogy are principally those which relate to holding to bail. In *Vaissier* v. *Alderson* (3), the description "of the city of *London*, merchant," was held sufficient; so "*Ely*, in the county of *Cambridge*," was held sufficient in an affidavit of justification: *Hunt's Bail* (4). So as to bills of sale, "*New Street, Blackfriars*, in the county of *Middlesex*," was held good, though, in fact, *Blackfriars* was in the city of *London*, for "*Blackfriars*" would itself have been enough: *Hewer* v. *Cox* (5). In *Routh* v. *Roublot* (6), which was also a decision on the *Bills of Sale Act*, the description "*Isaac Simpson*, clerk to *Lewis Frederick Lyne*, in the city of *London*, gentleman," given of himself by the attesting witness to the bill of sale, was held to satisfy the provisions of the 17 & 18 Vict. c. 36, though there was no statement that the person so described was the attesting witness, and though his residence was not given; a like decision had

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(1) 11 Ir. Ch. Rep. (N. S.) 278.

(2) Ibid. 356.

(3) 3 M. & S. 165.

(4) 4 Dowl. 272.

(5) 30 L. J. (Q. B.) 73; 3 E. & E. 428. 6 Jur. N.S. 139

(6) 1 E. & E. 850; ~~6 Jur. N.S. 5~~

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been previously given in the case of *Blackwell* v. *England* (1). In *Osborn* v. *Gough* (2), a notice of action, under 24 Geo. 2, c. 44 (which requires the name of the attorney and the place of his abode to be indorsed on the notice), containing the description "of *Birmingham*" was held sufficient. The first affidavit here was sufficient as to the form of description, but if all the requirements of the statutes as to verification were not actually complied with, they are fully supplied by the supplemental affidavit.

Mr. *Brett*, Q.C., and Mr. *Fitzgibbon* (of the Irish Bar), for the Respondent:—

Both the propositions on the other side are denied. It is not enough to give such a description as will identify to those who know the parties and the estate, the persons described in the affidavit. There must be such an identification as will suffice to afford proper information to all people of ordinary intelligence. The provisions in the Registry Acts were not intended merely for the information of those who were parties to the proceedings, but for the information of those who might want to examine the registry, with a view to protect themselves in making contracts or in enforcing liabilities. In *Crosbie* v. *Murphy* (3), an affidavit which described a judgment debtor as "*Bridget Curran*, of *Killorghan*, in the county of *Kerry*, widow," was held insufficient to create a judgment mortgage, although that description strictly followed the words of the judgment itself. Lord Chief Justice *Lefroy* there said (4): "If nothing more was meant than to transfer to the affidavit the description of the party as set out in the judgment, to what purpose shall we apply, or what necessity is there for, the additional words which the Legislature has said shall be inserted in the affidavit, precise words which, no doubt, are to provide for the change of circumstances which may occur in the course of time? . . . . The Act provides for the registry of bygone, as well as of recent judgments." The identification must be by the means pointed out by the statute; something deemed to be equivalent to those means will not do. In the case of *McDowell* v.

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(1) 8 E. & B. 541; 3 Jur NS/302

(2) 3 B. & P. 551.

(3) 8 Ir. Com. Law Rep. (N. S.) 301.

(4) 8 Ir. Com. Law Rep. (N. S.) 308.

Wheatly (1), the description of the land was, as it is here, stated by way of recital, and it was held insufficient; and that case never having been impeached, the Master of the Rolls in this case properly founded his decision upon it, and upon the case of *Francis Fitzgerald*. The former of these two cases gave rise to the second statute. The original registration here was in the form which the second statute described as defective, and that itself is sufficient to warrant the judgment of the Court below, for the second statute does not authorize the introduction of new facts, but merely authorizes the verification on oath of those facts which have been before informally stated. "*Ballina Park, Wexford*," might have been sufficient, if that had been the usual place of residence of the Defendant, or his last known place of residence. But it was not so, and the affidavit itself went on to shew that he had recently lived in another place, so that *Ballina Park* was shewn not to be his last, nor even his usual, place of abode. The description "of the city of *London*, merchant," might be sufficient justification of an affidavit to hold to bail, as in *Vaissier* v. *Alderson* (2), under the *Statute of Additions*, 1 Hen. 5, c. 5, on which Lord *Ellenborough* founded his judgment, but these Registration Acts require more than that, and consequently that case is not in point here. Where an Act of Parliament requires a particular thing to be done in a particular form, the form prescribed must be exactly observed: *Cotton* v. *Sawyer* (3). Cases of bills of sale have been cited on the other side, but the most recent of these strongly supports the argument of the Respondent. In *Pickard* v. *Bretz* (4) the description in the bill of sale was, "*J. B.*, of No. 9, *George Street, Minories*, in the city of *London*, hotel keeper," and the affidavit was, "*J. B.*, of No. 9, *George Street, Minories*, in the said city of *London*, in the said bill of sale mentioned," and that was held insufficient, a description by way of reference not being that which the Act had contemplated. The case of *Osborn* v. *Gough* (5) is no authority the other way, for there the description required was that of the attorney for the Plaintiff, by whom the notice of action was given to the magistrate. Of course, as the person described was de-

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(1) 7 Ir. Com. Law Rep. (N. S.) 562.

(2) 3 M. & S. 165.

(3) 10 M. & W. 328.

(4) 5 H. & N. 9.

(5) 3 B. & P. 551.

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scribed as an attorney, and as the attorney on the record suing for the Plaintiff, and as the Defendant did not appear to have been under any difficulty from the generality of the notice, it was absurd to suppose that the object which the statute had in view, that of enabling the magistrate to tender amends, had not been satisfied. Besides, *Birmingham* was at that time a town with only 60,000 inhabitants, whereas *Dublin* contains fifteen parishes and 258,000 inhabitants. The case of *Taylor* v. *Fenwick*, given in the note there (1), is much more like the present. There the notice was thus signed, "Given under my hand at *Durham*, *Richard Ratcliffe*, attorney for &c.," and that was held to be insufficient. [THE LORD CHANCELLOR:—Nothing there shewed where *Ratcliffe* resided or carried on his business. He might have lived anywhere else but in *Durham*.] In the case of *Hunt's Bail* (2), the description of "*Ely*, in the county of *Cambridge*," was held sufficient as a matter of fact; and in *Hewer* v. *Cox* (3) the name of the street and the district, "*New Street*," and "*Blackfriars*," being in themselves sufficient, they were not made insufficient by merely adding "*Middlesex*," although that addition was technically incorrect. But if, as here, the name of the county, or of the city of *London*, without the street or the district, had been put, the decision must have been the other way. Besides, these cases related to statutes or rules of Court, where the words were not the same as in the present case. The particularity of statement required by this statute is considerable, as may be seen from the fact that the affidavit is required to set forth not merely the name and place of abode of the debtor, but also of the creditor himself. This case is not affected by the second statute; the supplemental affidavit does not render the original affidavit sufficient. The second Act merely intended to cure informal affidavits by allowing a verification on oath of facts which appeared, but only informally appeared, on the first affidavit. Here the facts did not appear, except incorrectly, on the first affidavit, which was therefore defective in substance, and no mere verification afterwards of them as there recited, even if that could have been made, which was, perhaps,

(1) 3 B. & P. 553, n.

(2) 4 Dowl. 272.

(3) 30 L. J. (Q.B.) 73; 3 E. & E. 428, 6 Jur NS 1359

doubtful after so long a lapse of time, could supply the deficiency of the original affidavit.

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Mr. *Coleridge*, in reply:—

The object of the Act must be considered, and a reasonable interpretation put upon its words. The statements in the second affidavit must now be read as if they had existed in the first affidavit, and had afterwards been verified on oath.

THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, in this case I agree with the opinion of the Master of the Rolls, against the judgment which he felt himself bound to pronounce in consequence of a previous decision of the Court of Appeal. The view which I take of this case is, that the original affidavit contained in itself a sufficient description of the known place of abode of the judgment debtor, though there may have been a question as to whether it was sufficiently verified by oath. If it was not, then, of course, the 21 & 22 Vict. c. 105, would apply to the particular case; but if there had not been a sufficient description of the known place of abode of the party in the original affidavit, I think that the supplemental affidavit could not have cured that defect.

My Lords, the first affidavit was filed under the 13 & 14 Vict. c. 29, by which judgments may be registered in order to convert them into statutory mortgages. The 6th section of that statute requires that an affidavit should be filed for the purpose of registration, which affidavit is to state "the name or title of the cause or matter, and the Court in which such judgment, decree, order, or rule, has been entered up, obtained, or made, and the date of such judgment, decree, order, or rule, and the names, and the usual or last known place of abode, and the title, trade, or profession of the Plaintiff (if there be such), and of the Defendant or person whose estate is intended to be affected by the registration."

In this case a judgment was obtained by the Appellant against the father of the Respondent, Mr. *George Humphreys Browne*, for the sum of £4400. On the 7th of January, 1851, the Appellant filed an affidavit under the statute which I have mentioned, and that affidavit followed the statute in describing first the title of the cause, "*Daniel Thorp*, of *Kildare Street*, in the city of *Dublin*, attorney-at-law, Plaintiff; *George Humphreys Browne*, formerly of *Ballina Park*, in the county of *Wexford*, and now of the city of *Dublin*, Esquire"—mentioning the Court of Exchequer, in which the judgment was obtained. It then goes on thus:—[His Lordship read the affidavit. See *ante.*]

Now, it appears that this form of affidavit, which was adopted on this occasion, had been a form which had been proposed, published, and generally followed, and, for several years, had been considered to be a correct form. But, in the year 1858, in a case of *McDowell* v. *Wheatly* (1), that form of affidavit was questioned, and it was decided that it was not a proper form; and, in consequence, an amending Act, 21 & 22 Vict. c. 105, was passed, which recited that:—[His Lordship read the recital and the section, see *ante.*]

After the passing of this Act, the Appellant filed a supplemental affidavit in these terms:—[His Lordship read it, see *ante.*]

On the 19th of December, 1862, an order was made by the Landed Estates Court for the sale of the lands upon which this charge was made. On the 16th of June, 1864, the Appellant filed a Petition in the Court of Chancery, praying that his judgment debt might be declared a charge on the lands. The Petition was referred to the Master, and the Master, by an order, declared that the judgment against the Respondent's father was not a charge on the lands.

The grounds of this order are stated by the Master of the Rolls, in his judgment in this case, to be: "First, on the ground that the original affidavit did not comply with the 13 & 14 Vict. c. 29, having stated by way of recital only the name, and usual or last place of abode, of the Defendant *George Humphreys Browne;* secondly, that the supplemental affidavit could only supply the defect in the original affidavit by stating positively that which was stated in the original affidavit by way of recital, and that there was a defect in the original affidavit in stating the usual or last known place of abode of *George Humphreys Browne*, as 'formerly of *Ballina Park*, in the county of *Wexford*, but now of the city of *Dublin*, Esq.;' and, thirdly, that the supplemental affidavit could not, under the provisions of the 21 & 22 Vict. c. 105, supply that defect by stating that the *Four Courts' Marshalsea, Dublin,* was the place of abode of the said *George Humphreys Browne* at the time of the obtaining the judgment and swearing of the original affidavit."

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(1) 7 Ir. Com. Law Rep. (N. S.) 562.

Upon a motion, by way of appeal to the Master of the Rolls, he refused the Petition with costs, considering himself bound by the judgment of the Court of Appeal in the case of *Re Fitzgerald's Estate* (1); although he expressed his dissatisfaction with that judgment. Now, that case decided this, that in an affidavit filed under the provisions of the 6th section of the 13 & 14 Vict. c. 29, for the purpose of converting a judgment into a mortgage, the description of the Defendant's last known place of abode "as late of the town of *Galway*, but now of the county of *Dublin*," was insufficient, as being too vague. The Master of the Rolls thought that this decision in *Re Fitzgerald's Estate* was inconsistent with another decision in a case relating to the estate of another Defendant, reported in the same book, and in one respect, certainly, it is inconsistent.

The other case, *In re Fitzgerald's Estate* (2), decided this:—An affidavit which was filed for the purpose of registering a judgment as a mortgage under the provisions of the 13 & 14 Vict. c. 29, was intituled in the margin, "*John Magrath*, of *Doon*, in the county of *Waterford*, farmer, Plaintiff; *Thomas Joseph Fitzgerald*, of *Ballinaparka*, in the county of *Waterford*, Esq., Defendant;" and the affidavit ran in these words, that *John Magrath*, the Plaintiff in this cause, "maketh oath and saith that he, this deponent, by the name and description of *John Magrath*, of *Doon*, in the county of *Waterford*, farmer, did, on the 14th day of October, in the year of our Lord, 1852, obtain a judgment in Her Majesty's Court of Queen's Bench in *Ireland*, against the Defendant in this cause, by the name and description of *Thomas Joseph Fitzgerald*, of *Ballinaparka*, in the county of *Waterford*, for the sum of £400 sterling, besides" so much in "costs." It was held in that case that the above was a sufficient description of the name, and usual or last known place of abode, of the Defendant. Now, the only distinction between the affidavits in the two cases is this: that in that case the Defendant is described as "of *Ballinaparka,* in the county of *Waterford,*" but in the other, the Defendant is described as "late of the town of *Galway,* but now of the county of *Dublin.*" The part of the judgment in one case which is inconsistent with that in the other is this: The Court of Appeal held, in the earlier case, that there was no doubt whatever as to the invalidity of a Mr. *Redington's* affidavit, "inasmuch as it does not contain any averment pledging his oath to the identity of *Fitzgerald's* last known place of abode; it merely states the facts which are embodied in the description of the judgment." Your Lordships will see that in the later case, the affidavit being also a statement of the facts embodied in the judgment, it was held that it was a sufficient description, if properly verified by oath, but that was because it correctly set forth the name, and the usual or last place of abode of the Defendant.

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(1) 11 Ir. Ch. Rep. (N. S.) 278.

(2) Ibid. 356.

It appears to me, my Lords, as I have already stated, that the original affidavit in this case was sufficient. We have to look to what the object and intention of the Legislature were in requiring that there should be these particulars describing the judgment debtor, with his place of abode. It was clearly for the purpose of identification. It was not that there should be an exact description of the very place where he was residing, so that any person might resort to him there, and ascertain any particulars. It was for the purpose of distinguishing him from all other persons, and leaving no doubt whatever as to the identity of the person against whom the judgment which was to be a charge upon the lands had been obtained.

I think we may bring this to a practical test. There was an order in this case for the sale of the estates by the Landed Estates Court. An intending purchaser would, of course, go to the registry for the purpose of seeing whether there were any charges upon the estate, and would search the registry for judgments; and he would find one for £4400 against "*George Humphreys Browne,* formerly of *Ballina Park,* in the county of *Wexford.*" Whether it would appear upon the face of the register that he was now of the city of *Dublin,* or not, is immaterial. That would be a sufficient identification of the party, and would sufficiently inform the intending purchaser that there was a charge to the extent of £4400 in respect of a judgment obtained against *George Humphreys*

Browne. Now, what more can be required? What possible good could it do to the intending purchaser to be told that Mr. *George Humphreys Browne* was living at such a number in *Merrion Square, Dublin?* He would not go to him to know the particulars of the judgment; the particulars of the judgment sufficiently appear on the face of the register. Therefore, my Lords, it appears to me that the object of the statute is entirely satisfied by this description of the last known place of abode of the party, even if it be in the general terms which the Court of Appeal considered to be insufficient.

Now, supposing that the original affidavit did not sufficiently describe the place of abode, then it appears to me that the statute 21 & 22 Vict. c. 105, and the affidavit founded on it, would not cure that defect; because it is quite clear that all that the Legislature meant was to enable parties to cure defects where the facts were sufficiently stated in the affidavit, but were not covered by a verification; and it does not apply to a case in which the facts are insufficiently or not at all stated. As I have already intimated, an insufficient statement of a fact is the same as if there were no statement of it at all; and, therefore, this supplemental affidavit could be of no use to cure a defect in the original affidavit arising from the want of a sufficient statement of the known place of abode of the party. I do not think it necessary to trouble your Lordships with any examination of the particular expressions contained in this section of the statute, upon which many observations have been made; but, undoubtedly, that supplemental affidavit will be of use if we consider that the decision in the first *Fitzgerald* case was not a correct decision, and that the recital of the place of abode in the description of the judgment was sufficient to satisfy the statute. If that were so, there could be no verification of the place of abode, even though "now of the city of *Dublin*" would be a sufficient statement of that place of abode; and then the affidavit would supply a most important defect, because it would verify on oath the description of the last known place of abode, and it would, moreover, give in addition (which is the benefit conferred by this Act of Parliament) the present place of abode of the party at the time of swearing the supplemental affidavit. In this case the original affidavit was sworn eight years before the supplemental

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affidavit; therefore, it could hardly be so useful to an intending purchaser as if the statement of the place of abode had been brought down to the time when the supplemental affidavit was made.

Under these circumstances, I have no doubt whatever that the original affidavit sufficiently complied with the statute of the 13 & 14 Vict. c. 29, and that the order of the Master of the Rolls ought to be reversed.

LORD CRANWORTH:—

My Lords, I have come to a conclusion exactly the same as that which has been expressed by my noble and learned friend, and upon the same grounds.

When an Act of Parliament requires for any purpose that the usual or last known place of abode of a person shall be stated, it is impossible, by any language framed beforehand, to be able to say exactly how accurate the description must be. For the purpose of deciding that question we must look to the motives of the Legislature in making the requisition. There are certain purposes for which the description in this case would certainly have been an inadequate description of the place of abode. Your Lordships are well aware that in trials for high treason, the prisoner must have a ten days' notice of the place of abode of every witness to be called against him. What was the object of that? It was required because it was thought that in this particular sort of trial it was the duty of the Legislature to fence round the accused party with every possible caution, and that no person should be called as a witness with respect to whom the prisoner had not an opportunity beforehand of investigating all circumstances relating to him. For that reason a very minute description is required in the case of witnesses against prisoners charged with high treason. I think I remember that in the case of the trial of *Watson* for high treason, it was held that it was not sufficient to describe a person as of "12, *Castle Street*," because it was said that there is a great number of Castle Streets, and that therefore the party might have been misled. Therefore we must look to what was the motive for requiring the description here. It is, that persons who are searching the register for the purpose of seeing what incumbrances affect the particular property, may be able to know exactly who it is that has affected the property by having registered a judgment recovered against it. Is that the sole object? Undoubtedly, we have the authority of the Legislature for saying that it is. For in the second statute, after reciting the forms of affidavits that had been adopted, and stating that it had been doubted whether they were in strict conformity with what was required by the first statute, it goes on to say as a reason for enabling the parties to make supplemental affidavits: "And whereas all persons who have searched the said registry must have had full notice of such facts so far as same have been truly stated;" and therefore the merely not having formally verified them was immaterial; and the Act gave the power of making a supplemental affidavit. That appears to me perfectly clear, and that this was a sufficient description for this purpose I think no man can doubt.

I should be very sorry to say, as an abstract proposition, that it would always be sufficient to describe a man as of "the city of *Dublin*." I do not feel called on to say that, because we have here a great deal more than "the city of *Dublin*." We have "of the city of *Dublin*, and formerly of *Ballina Park*, in the county of *Wexford*." Now, although it may be difficult to discover a person of the name of *Browne*, merely because he is described as "of the city of *Dublin*," there cannot, I think, be the least doubt that for the purpose of enabling an intending purchaser to make the necessary investigation the description "*George Humphreys Browne*, of the city of *Dublin*, and formerly of *Ballina Park*, in the county of *Wexford*," was perfectly sufficient.

I will only add this observation, that I am not quite clear that this case is governed by the earlier one of *Re Fitzgerald's Estate*, because there the description was very different. It was "formerly of the town of *Galway*, but now of the county of *Dublin*." I do not think that to describe a person as of a particular county is sufficient. For example, if you said "of the county of *York*," it would be no description at all.

I entirely concur in the opinion of my noble and learned friend, and think that this judgment ought to be reversed.

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LORD COLONSAY :—

My Lords, the question here arises upon the validity of the original affidavit as cured, or attempted to be cured, by the supplemental affidavit. In regard to the original affidavit, two objections were taken. One of these was, that the description of the name and place of abode of the debtor, if it was there at all, had not been verified on oath. The other was, that his name and place of abode had not been sufficiently stated.

Now I concur with the argument, which has been urged on the part of the Respondent, as to the import and effect of the second of the statutes that have been referred to. I am of opinion that that second statute was not intended to supply omissions or defects of statement in the original affidavit, but that it was intended merely to permit verification of matters that had been stated in the original affidavit. But viewing it in that light, it is sufficient to cure one of the defects that occurred in the first affidavit, for it is admitted that if there was any want of verification in the statement, such as it is, of the abode of the Defendant in the first affidavit, that is sufficiently covered by the second affidavit, which does verify the statement.

4QBD604

But, in regard to the other objection, which, I think, is the substantial question here, it is one that stands upon a different footing. The question raised is, whether the statute requiring that the name and place of abode of the debtor shall be set forth has been complied with. I am very decidedly of opinion that when a statute requires a particular thing to be done, and especially when it requires something to be done in regard to a matter such as this, which has the operation of transferring rights on lands, it is necessary that the statute should be complied with in the way that is there pointed out, and that equivalents cannot be accepted. But there is a great difference between the entire omission of the statement and the question whether the statement is sufficient for the accomplishment of the purpose of the statute. Omission of statement, or error of statement, is very different from vagueness of statement; and when vagueness of statement is pleaded, then it is important to consider what is the object for which the statement is required by the statute.

7QB159,

There are statutes which require statements of the name and place of abode for purposes which make it absolutely necessary that those particulars should be minutely given. My noble and learned friend who last addressed the House has alluded to the case of lists of witnesses in cases of high treason. In the criminal law, in the other end of the island, the same rule exists in regard to all criminal trials. Every person accused of crime is entitled to have given to him, along with the indictment, a list of the names of the witnesses and their places of abode; and the question not unfrequently occurs there, whether the statement which has been made is sufficient or not. The right of the prisoner to object in that respect is qualified by this course of procedure, that if he alleges that the description is insufficient, he must state that objection before going to trial; and he must shew that he has endeavoured, and unsuccessfully, by reasonable inquiry, to make out the place of abode of the witness in order that he may have access to him. The object of that rule of criminal procedure is this, that the prisoner may have immediate access to the witness before the few days that are allowed him preparatory to his trial elapse, in order that he may ascertain from that witness what are the matters which the witness intends to state against him. The object, therefore, is to give the opportunity of personal and immediate access to the individual described. But here, as happens also in other matters with which we are familiar, the object of requiring the name and designation of the party is very different. It is for the purpose of identification. It was very ingeniously and adroitly put by the counsel who last addressed your Lordships on the part of the Respondent, that something more was intended here, and is necessary, because the name and place of abode of the creditor is required, as well as the name and place of abode of the debtor. But I do not think that argument, when you come to look at it, has much weight, because the object in both cases is to identify the party who is the creditor on the one hand, and the debtor on the other. Identification is the object in both cases, and the statute requires that the name and place of abode of both shall be stated, so far as it is necessary for the purpose of identification.

What is stated here is, that the party was "formerly of *Ballina Park*, in the county of *Wexford*, now of the city of *Dublin*." It is attempted to shew that this statement of the place of abode is insufficient; and the objection is, that it is too vaguely stated. Now it does not follow, that though a party is known to be living in the city of *Dublin*, his particular street or number in the street are known; and what is the creditor in that case to do? He must make his affidavit. He is to state as far as he knows, and he states, "formerly of *Ballina Park*, in the county of *Wexford*," and he adds, "now of the city of *Dublin*." Those are certainly traces of the party, which, so far as they go, will serve to identify him; and I think there is enough here stated for the purpose of identification. Then, if that be so, if the original affidavit is sufficient to identify the party, so that intending purchasers, or others who have occasion to examine the register, can have no difficulty in knowing who was the creditor and who was the debtor, the statute is sufficiently complied with. It must be a question in each case, whether the description given of the place of abode is or not sufficient. It is admitted that in some cases it is not necessary to go farther than to name the town, without giving the street or number. It is in every case a matter for consideration with reference to the particular object to be attained by the description that is required to be given. In this case, where the object is such as I have stated, the description appears to me to be quite sufficient. And although there may have been two judgments given in the neighbouring island, in regard to this matter, which are adverse to the view I have arrived at in this case, yet these judgments do not appear to have been confirmed by any decision of this House, and they are now substantially on their trial in this case. I therefore entirely concur in the view which has been expressed by my two noble and learned friends.

Orders appealed from reversed, and the cause remitted.

Lords' Journals, 6th June, 1867.

Solicitor for the Appellant: *R. Comyn.*
Solicitor for the Respondent: *T. H. Baker.*

THE MAYOR AND ALDERMEN OF THE CITY OF LONDON . . . } PLAINTIFFS IN ERROR;

AND

RICHARD HENRY COX, AND OTHERS DEFENDANTS IN ERROR.

1866
July 2, 3.
1867
May 8;
July 30.

Foreign Attachment—Prohibition—Pleading.

Where an inferior Court proceeds in a cause properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the Court is incompetent to try.

But where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once.

The Lord Mayor's Court in *London* is an inferior Court.

When, therefore, process had issued out of that Court against *C.* as a garnishee, and he declared in prohibition—a plea which set up the custom of foreign attachment, but did not allege, and the fact did not warrant any such allegation, that the original debt, or the debt alleged to be due from the garnishee to the Defendant, arose within the *City*, or that any one of the parties to the suit was a citizen, or was resident within the *City*, the plea was held insufficient to shew the existence of jurisdiction.

And consequently the garnishee was at liberty in such a case to proceed in prohibition without first putting in a plea in the Lord Mayor's Court setting forth the facts which shewed the want of jurisdiction.

The cause of action must arise & the garnishee reside within the City in order to give the Ld Mayor's Ct. jurisdiction (1)

THIS was a proceeding in error against a decision of the Exchequer Chamber, which had affirmed a previous decision of the Court of Exchequer. *Cox & Co.* had declared in prohibition against the Mayor and Aldermen, and the declaration set forth the following facts:—On the 17th of September, 1860, *Sarah Buckmaster* and *Robert Adams,* trading under the firm of *Buckmaster & Co.*, levied a plaint in the Lord Mayor's Court against one *Richard A. Farquharson* to recover a debt of £86 3*s*. The return made was, that *Farquharson* had nothing in the *City* whereby he could be summoned, nor was he to be found within the same *City*. Upon this return of *nihil, Buckmaster* made a suggestion, according to the forms established in the Lord Mayor's Court, to the effect that *Cox & Co.* (who were personally found within the jurisdiction, though they were neither citizens of *London*, nor resident within the *City*) were debtors to *Farquharson* in the sum of £86 3*s*., and on this they were warned (made garnishees) to come in and to answer

3 C.L. 201
5 Ex. 231
6 C.P. 142.-
8 C.P. 110-4.
116-7
18 Eq. 286
9 C.P. 416,
18 Eq. 345
20 Eq. 3, 5, 8
9
10 C.P. 38
20 Eq. 557
1 C.P.D. 15
— 238
— 419
— 41
— 421
— 635-7.
1 P.D. 48
2 Ex. D. 34
2 Q.B.D. 562
4 Q.B.D. 709

(1) See L.R. 8 C.P. 107. 110 3 C.P.D. 491
14 Ch.D. 235, 6 App Cas 418 9 Q.B.D. 605
19 Ch.D. 218. 348.

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whether they were indebted as alleged. They did appear according to the warning. *Buckmaster*, *Farquharson*, and *Cox & Co.* did not, nor did any of them, reside or dwell within the *City*, or carry on business there, or within the jurisdiction of the Court. Neither the debt claimed from *Farquharson*, nor that alleged to be due to him from *Cox & Co.*, had accrued within the *City*, or within the jurisdiction of the Court. *Cox & Co.* therefore alleged that the Mayor and Aldermen had no jurisdiction over the plaint or garnishment, or over them as garnishees, at any time during the proceedings, wherefore *Cox & Co.* prayed prohibition, &c.

The Mayor and Aldermen pleaded, that by the custom of the City of *London*, if any plaint of debt should be levied or affirmed by any person in the Lord Mayor's Court, and the serjeant-at-mace on being ordered to summon the Defendant in the plaint to appear and answer thereto, should testify that the Defendant in the plaint had nothing within the *City* whereby he might be summoned, and he made default, and the Plaintiff in the suit should testify and allege that some other person was indebted to the Defendant in the plaint in a sum amounting to the debt in the plaint specified, or a part thereof; then on the said Plaintiff's petition the Court might command the serjeant-at-mace to attach the Defendant in such sum, being in the hands or custody of such other person, found within the jurisdiction of the Court; to be defended and kept, so that the Defendant might appear in Court to answer the Plaintiff. And if the Defendant at that and three other Courts did not appear, but made default, and such four defaults were recorded against him, and if the Plaintiff at each of such Courts did appear, then, at a subsequent Court, on the Petition of the Plaintiff, it was and had been used for the Court to command any serjeant-at-mace to warn such other person so being found within the *City* to appear at any subsequent Court to shew cause why the Plaintiff should not have execution of the sum so attached. And if at such Court the serjeant-at-mace should return and certify such other person in whose hands such sum had been attached, to be warned according to the said custom to appear in the said Court and shew such cause, and if such person, so warned, being solemnly called, did not appear, but made default, then it was and had been accustomed for the Court to award the Plaintiff to have execution of the sum so attached, to satisfy the Plaintiff, &c., by sufficient pledges to be given by the Plaintiff, to restore to the Defendant the sum of money so attached, if the Defendant within a year and a day thence next ensuing should come into Court and disprove or avoid the debt in the plaint mentioned. And after such pledges found, and execution had, of the sum so attached in the hands of such other person, he was discharged, as against the Defendant, of the sum so attached and had in execution; and the Defendant was discharged of so much of his debt so long as such judgment and execution should remain in force. And if the sum so attached and had in execution should not amount to the whole of the debt in the plaint demanded, then, by the custom of the Court, the Plaintiff had been accustomed to have process against the Defendant for the residue of his debt. The plea went on to allege that this and all other customs of the said *City* had been confirmed by authority of Parliament in the 7 *Richard* II., and by divers other statutes, and it set forth the proceedings in the suit by *Buckmaster* against *Farquharson* as Defendant, and against *Cox & Co.* as garnishees, in strict accordance with the alleged custom.

To this plea there was a general demurrer. The Plaintiffs in prohibition (*Cox & Co.*) also replied that the alleged custom did not give jurisdiction over any plaint where, at the time of levying it, neither the Plaintiff nor the Defendant resided, dwelt, or carried on business within the *City*, or the debt or cause of action had been contracted or had accrued within the *City;* and that the custom did not give jurisdiction to summon any other person as garnishee, or to attach the Defendant by a sum in such person's hands where such third person at the time of such summons did not reside, dwell, or carry on business within the *City*, nor where the garnishee's debt had not arisen or accrued within the *City*, and that the custom did not give jurisdiction to attach, as mentioned in the plea, a Defendant who did not, at the time of such testification, or allegation, and command, reside, dwell, or carry on business within the *City*, nor where the garnishee's debt had not accrued within the *City*.

Demurrer to this replication, and joinder in the demurrer to the plea.

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On suggestion and writ, the Recorder appeared in Court, and certified in the usual way, by word of mouth, that the custom was as stated in the plea.

The demurrers were argued in November, 1861, and the Court gave judgment for the Plaintiffs in prohibition (1). On error, brought in the Exchequer Chamber, this judgment was affirmed (2). The case was then brought to this House on Error.

The Judges were summoned, and Mr. Justice *Willes*, Mr. Justice *Blackburn*, Mr. Baron *Pigott*, Mr. Justice *Shee*, and Mr. Justice *Smith*, attended.

Sir *F. Kelly*, Q.C., and Mr. *C. E. Pollock*, Q.C.:—

The mistake in the Court of Exchequer was in treating the Lord Mayor's Court as a local and inferior Court. It never bore that character. It was always a Royal Court. It so existed in the time of *Edward the Confessor* (3); it was so recognised in the Charters of *William* I. and *Henry* I. (4). In all the legal proceedings of ancient times it bore the title of "The Court of the Lord the King before the Mayor and Aldermen," &c. It is so styled in the writ issued by the Exchequer in the case where the Recorder *Starkey* certified the custom (5). Its powers are not to be tried by the same standard which might possibly be applicable to a Court which really was an inferior Court with a merely local jurisdiction. If, therefore, there is any objection to the jurisdiction, as that objection is not apparent on the face of the proceedings themselves, it must be taken by plea; it cannot be assumed, and by force of that assumption a prohibition be applied for. The last Act of Parliament relating to this subject shews that to be the case. In the 20 & 21 Vict. c. clvii., passed to regulate its procedure, the 15th section expressly provides that "no Defendant shall object to the jurisdiction of the Court, in or by any proceeding whatever, except by plea." Here, there having been no plea of that kind, the Respondents have no right to ask the judgment of the Court on this prohibition.

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(1) 1 H. & C. 338. 8 Jur. N.S. 542

(2) 2 H. & C. 402; 9 Jur. N.S. 800

(3) Thorpe's Saxon Laws, p. 35.

(4) Bohun's *Privilegia Londini.*

(5) 1482. *Hariot*, Mayor; *Humfry Starkey*, Recorder. 22 Ed. IV. L. 175. The writ is directed to the Mayor and Aldermen. It recites a plaint between *Roger Bourgchier, of London*, Plaintiff, and *John Colyns, late of London*, and "*citizen of London*," Defendant; and it proceeds: "Whether in the city aforesaid such is, and from time immemorial hath been, the custom, to wit: That if any plaint of debt shall be levied or affirmed by *any person* in the *Court of the Lord the King, before the Mayor and Aldermen* for the time being, in the Chamber of the *Guildhall* of the same city, so that by virtue of such plaint the same Court shall command any serjeant-at-mace of the same Mayor, *within the same city*, and the ministers [the words 'ministers of such Court' were used as the synonyms of 'serjeant-at-mace'] of such Court, to summon the party Defendant in the same plaint specified to appear at the next Court of the Lord the King in the Chamber of the *Guildhall* of the same city, to be holden before the Mayor and Aldermen of such city, to answer the Plaintiff in the same plaint named," and such serjeant-at-mace shall certify that the Defendant had nothing *within the liberty of the city aforesaid*, and the Defendant made default, and thereupon the Plaintiff shall

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1 C.P.D. 13.
6 App. Cas. 460

The antiquity and high authority of the Court cannot be controverted. In *Pulling's* Customs of *London* (1), it is so spoken of, and the custom is mentioned as, in fact, a continuation of the custom in the Roman Courts when *London* was held by the Romans. It is fully described in *Brandon* on Foreign Attachment (2), and such a custom was, and still is, in full force in *Scotland,* where it is called "Arrestment" (3); it exists in *France,* under the name of "*Saisie arrêt*" (4); and in *America* under the same name as here (5). The Court which administers this law was known as the Court of the Husting: *Bacon's* Abridgment (6); and in the reign of *Edward the Confessor* was directed to be held in *London* upon the Monday of every week. The portreeve or mayor was to administer the common law and the bishop the ecclesiastical law. *William* I. confirmed the existing Saxon laws, but afterwards changed the mode of legal administration by introducing the *Aula regia.* There was, however, no evidence to shew

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testify and allege "that some other person, for any cause whatever, is indebted to such Defendant in any sum of money amounting to the debt in the plaint aforesaid specified, or any part thereof," then, on the petition of the Plaintiff, the Court shall command the serjeant-at-mace "to attach the Defendant by such sum so being in the hands or custody of such other person." [There is no expression "within the said city," except in the parts already quoted. The Recorder certified that such was the custom.]

(1) Page 187.

(2) "Review of the Judgments, &c., with Historical Notices, by *Woodthorpe Brandon,* Esq., Barrister-at-law."

(3) 2 Bell's Dict. "Arrestment," "Foreigner."

(4) Code de Pro. Civ. 557; Pothier, Tr. Pro. Civ. c. 2, s. 3.

(5) 2 Kent, Com. 515.

(6) Courts in *London.*

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that the Lord Mayor's Court was subjected to the new tribunal, and in the reign of *Henry* I. there was a charter of confirmation of the liberties of the *City* in detail; that charter expressly declared that the citizens of *London* shall appoint "whom and whatsoever person they please, from amongst themselves, as justiciary to keep the pleas of my Crown, and the same to plead: and none other shall be justiciary over the same men of *London*. And the citizens shall not plead without the walls of the *City* for any plea. And there shall be no longer miskenning in the Husting, nor in the Folkmote, nor in other pleas within the *City*; and the Husting shall sit once in the week, that is to say, on Monday. I will cause my citizens to have their lands and recognizances and debts within the *City* and without. And that all debtors who to the citizens of *London* are indebted, shall repay them in *London*, or else shall prove in *London* that they owe them not: but if they should refuse to pay them, or to come and prove that they do not owe them, then shall the citizens of *London*, to whom such debts are owing, take their distress, in the City of *London*, of the borough, or town, or county wherein the debtor dwells." In the reign of *Henry* III. "questions" were put to the citizens by *Hubert de Burgh*, sitting at the *Tower*, under commission from the King; and one of these was, whether "the bailiffs of the *City* might determine the plaints of persons passing through the *City*, who cannot make any stay there. Such persons, that is to say, as are *piepoudrous*—as to debts due or injuries done to them? or must they await the sitting of the Husting?" The answer was, that the Husting had not ordinarily dealt with the cases of such persons; but a pledge was given that, in future, provision should be made for such cases on each day, and "justice should be done without delay, without reference to the Husting." This shewed the universality of its jurisdiction as to the persons who were to be subject to it. In the 12 *Edward* I. ordinances were made which provided for carrying this arrangement exactly into effect. In the 7 *Richard* II. all its then existing privileges were confirmed by Act of Parliament. In no way whatever did the Mayor's Court bear the character of a local or an inferior Court. The customs of the *City* were to be certified, if occasion required, to the King's Courts by the Recorder by word of mouth, and a certification of that kind was on record in the 22 *Edward* IV. That certificate (1) completely bore out the jurisdiction as now claimed. To this it might be added, that no writ of error lay to the Courts at *Westminster* from the Mayor's Court, but only under a writ from Chancery to a Court of Commissioners at *St. Martin's-le-Grand* (2); and thence to the House of Lords: *Greene* v. *Cole* (3). That has now been altered by statute 20 & 21 Vict. c. clvii. It is obvious, therefore, that to treat the Mayor's Court as an inferior and local Court, in the ordinary sense of those words, was erroneous. The dictum of Lord *Kenyon*, in *Barrymore* v. *Taylor* (4), was merely *obiter*, and was made in disregard of all the ancient history of the Court. The cases of *Wadsworth* v. *The Queen of Spain* and *Haber* v. *The Queen of Portugal* (5), have really no bearing on the subject, for they only prove that a person in *London* cannot be made a garnishee, as one possessed of the property of a foreign sovereign, in order to compel that sovereign to appear as a Defendant in the Court. That principle had been clearly laid down with regard to the Court of Chancery itself in *The Duke of Brunswick* v. *The King of Hanover* (6), where the rule declared was, that a foreign sovereign coming to *England* (and there the Defendant also held the character of a British subject), could not be made responsible in the Courts of *England* for acts done by him in his sovereign capacity in his own country. But that privilege does not extend to private debtors.

Then as to the locality of the debt: in *Harington* v. *Macmorris* (7), it was held that in a foreign attachment it was not necessary that the debt should arise within the jurisdiction, or that the Defendant should be resident within it. It may be observed that the garnishee there was the Plaintiff's debtor, and the garnishee set up the defence that the debt had been attached, and that he had been obliged to pay, so that the question of jurisdiction did not come directly before the Court; but still it was not there averred that either of the debts did arise within the jurisdiction, or that the parties resided within it. In *Banks* v. *Self* (8), it was held not to be necessary to aver that the Plaintiff in the principal case was

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(1) See *ante*, 242.

(2) Fitz. N. B. 23. 7th Ed. 55.

(3) 2 Wms. Saund. 252; 2 Burr. 777; Tidd, 1137.

(4) 1 Esp. 326.

(5) 17 Q. B. 171.

(6) 2 H. L. C. 1.

(7) 5 Taunt. 228.

(8) Ibid. 234, *n*.

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indebted to the Plaintiff below, within the jurisdiction of the Mayor's Court. In *McDaniel* v. *Hughes* (1), the garnishee was held entitled to set up a payment made by him under a judgment in the Mayor's Court, even though not only was there, in that case, no notice to the original Defendant, but the attachment had issued before the money of the original Defendant actually came into his hands. All these cases shew that the declarations made in the judgment in the Court of Exchequer that "the cause of action must arise within the jurisdiction," and that "the Defendant must have notice of the action by the service of process upon him," are erroneous. The necessity for a Court with such powers is paramount in a city the dealings of whose citizens extended all over the world, and which was daily visited for the purposes of trade by merchants from every country on the globe. It is for the benefit of foreigners as well as citizens. A Russian owes an Italian money, they meet in *London*, there can be no reason why the one should not sue the other here. [Lord Westbury:—How would the Plaintiff get execution?] That difficulty does not affect the question of the right to bring the action. But if he may sue in one of the Courts at *Westminster*, why may he not sue in the Mayor's Court? In principle there can be no difference between them. This custom is good. In *Lewisse* v. *Masters* (2), it was held that a custom might be good though it was against the common law, and it was said that there were some such which had been confirmed by Act of Parliament. [Lord Cranworth:—The Act regulating the procedure of the Mayor's Court was a private Act.] It was so, but since then there has been a decision that a prohibition to stay the proceedings will not lie, and that the objection to the jurisdiction must be raised by plea: *Manning* v. *Farquharson* (3). The 18th section shews that no process in foreign attachment shall be removed till after the same has been set down for trial. [Lord Cranworth:—What is the meaning of the last words of that section?] That the sum of money sought to be attached is not the debt or the money as alleged. That Act confirms as strongly as possible the legal right of the corporation to the jurisdiction now claimed. A legal origin need not be shewn for a custom as for a prescription: *Gateward's Case* (1).

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(1) 3 East, 367.

(2) 5 Mod. 75.

(3) 30 L. J. (Q. B.) 22.

6 Jur NS. 1300

As to the fact of the jurisdiction, it is concluded by the certificate of the Recorder. The only remaining question, therefore, is, whether this jurisdiction is so contrary to the principles of law that it cannot be sustained, and whether the proceedings can be supported in their present state? On this point it is submitted, as a clear rule of law, that where the jurisdiction appears on the face of the proceedings to be valid, it can only be controverted by plea, and that before plea no prohibition can be applied for. The other proposition, that it can be granted at once, is contrary to law. The *Bishop of Winchester's Case* (2) is, in truth, no authority for that proposition. The third resolution shews that. It is there said (3): "It was resolved that the traverse was insufficient, for, as it is said in the 8 Edw. 4, 14a., the Spiritual Court will not allow any plea in discharge of tithes; therefore the refusal is not material, for the party may have a prohibition before any such plea pleaded by him." That is not so here. The plea ought to be pleaded and regularly adjudicated upon, and if the adjudication on it was improper, prohibition might then be granted. The effect of this resolution is thus stated in *Thomas* and *Fraser's* edition of *Coke's* Reports: "A prohibition does not lie unless that which is alleged as cause for a prohibition has been pleaded in the Court." The garnishee ought, therefore, to have pleaded. If he is a mere stakeholder, he may not have title to set up such a defence, but then, for the same reason, he cannot ask for a prohibition. Where the Court has jurisdiction over the cause of action, the objection to its exercise, in that particular case, must be pleaded: *Dike* v. *Brown* (4). In *Anonymous* (5), *Holt*, and all the Court, agreed that if the inferior Court had jurisdiction over the cause of action, no prohibition could go on a mere suggestion that the cause of action arose out of the jurisdiction, but the party ought to plead to the jurisdiction, and if the plea was refused, then they might move for a prohibition. In another *Anonymous Case* (6), the same rule is laid down. Where the matter going to the jurisdiction is, as

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(1) 6 Co. Rep. 61.

(2) 2 Co. Rep. 43.

(3) 2 Co. Rep. 45.

(4) 2 Ld. Raym. 835.

(5) 11 Mod. 132.

(6) 1 Ventr. 236.

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it is here, matter extrinsic, it must be presented to the Court by plea. *Cook* v. *Licence* (1) establishes that a party shall not have a prohibition till the time of pleading, and shall not plead to the jurisdiction till he appear, and it is there declared that if the debt arise out of the jurisdiction the garnishee may plead it. In *Anonymous* (2), a similar rule was applied as to proceedings in the Ecclesiastical Court, where the cause for prohibition did not appear on the face of the libel. That point had, in fact, been decided long before in *Lucking* v. *Denning* (3), where the first and third resolutions of the Court shew, that if the objection to the jurisdiction arises on matter not appearing on the face of the declaration, it must be set up by plea of him who objects to the jurisdiction. That the Legislature favoured this jurisdiction is shewn by the Act 20 & 21 Vict. c. clvii.; and *Manning* v. *Farquharson* (4) shews that since that Act, even where, in fact, the cause of action does arise out of the jurisdiction, that objection cannot be admitted unless it is pleaded.

The object of the attachment is the same as was that of the distringas, namely, that of compelling appearance and obedience to the Court. It does not decide the action—it merely puts the parties in a situation to disclose the merits of the case. On the motion for a distringas, no question could be raised as to the jurisdiction of the Court: *Tidd* (5); nor can any such be raised on the issuing of the attachment. The facts to shew that there was no jurisdiction to issue it must be pleaded.

In *America* the law of foreign attachment prevailed in all the states, and the nature of it may, perhaps, best be gathered from the case of *In re F. Marty* (6). There an attachment had been issued *ex parte*—a motion was made for a supersedeas on the ground that the attaching creditor was a non-resident, and that his claim was in respect of a debt not accruing within the state, and due, if at all, from a non-resident foreigner. The application for the attachment had merely set forth that *Marty* was indebted to *Valtellina* in a sum of 800 dollars. The case was considered on all the points, and in the course of the judgment many similar cases were referred to, especially one where it had been supposed that the attachment would not lie in respect of a non-resident creditor, and a debt arising out of the jurisdiction, but which case had been distinctly overruled. The decision, as expressed in the head-note to the case, declared that "a non-resident creditor, who is only temporarily here, and not domiciled, may sue out an attachment against his debtor, who is a non-resident, even upon a debt contracted abroad, and it is not necessary that the debtor should ever have been resident here." The principle of foreign attachment was distinctly upheld there, and upheld, as it ought to be here, on the ground of the necessities of commerce.

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(1) 1 Ld Raym. 346.

(2) 2 Salk. 551.

(3) 1 Salk. 201.

(4) 30 L. J. (Q.B.) 22.
6 Jur NS/308

(5) 1 Tidd, 417.

(6) 2 Barb. 436; Reports in the Supreme Court of the State of *New York*.

Mr. *Montagu Chambers*, Q.C., and Mr. *J. O. Griffits*, for the Respondents:—

The Defendants in Error have adopted the only proper course in applying for this prohibition, and the plea here affords no answer to the declaration. There was no jurisdiction in the Court which warranted the proceeding against them. The principle on which the superior Courts of the country are to keep others within the bounds of their jurisdiction, is fully explained in *Bacon's* Abridgment (1). The subject has a practical right to demand a prohibition, though, no doubt, the issuing of it is a matter for the discretion of the higher Courts, that is, though it is at law matter of right, it is not matter of course. The party wrongly attached is not bound to wait till judgment is given against him—till the mischief is done—before he applies to be protected against it.

The benefit of foreign attachment was intended to be conferred on the citizens, and on them alone. That is clear from the language of all the charters, and the Husting Court is strictly a local or civic Court. The description of the custom in the *Liber Albus* (2) has no reference to anything but debts and goods, "within"

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(1) Tit. "Prohibition."

(2) Edit. by *H. T. Riley*, 1859, published under the direction of the Master of the Rolls, p. 183. This book is said to have been compiled, in 1419, by *John Carpenter*, then town clerk. The article referred to is given in these words:—

"Item. Where a plaint of debt is brought before any of the said sheriffs, and testimony is given by the minister that the Defendant hath not sufficient *within the City*, and it is alleged by the Plaintiff that the Defendant hath goods and chattels, or debts, in other hands, or in other keeping, *within the said City*, and the Plaintiff prayeth

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or "in the said *City*." It could only be inquired and found in the *City* that the Defendant had not sufficient assets, or that he had assets in the shape of goods or debts in the hands of third persons, for there was no power to make inquiry and finding elsewhere, nor could the return of the *City* officer relate to anything but what he found within the *City*. The words used in all the charters, from *Bohun's Privilegia Londini* downwards, refer everything to the *City*. Even the certificate of the Recorder, *Starkey* (1), bears out this argument. The alleged custom, therefore, is not such as has here been attempted to be enforced. *Tamm* v. *Williams* (2) directly decides, that in a plea of foreign attachment it is necessary to aver that the garnishee is resident within the jurisdiction of the Lord Mayor's Court. In *Traub* v. *Schmidt* (3), it was held that to give to the Lord Mayor's Court jurisdiction, it is not sufficient that the garnishee resides within the *City*, the cause of action must also have occurred there; and that was decided by Lord Chancellor *Eldon*, and on that decision an Order, dated 19th December, 1817, was founded, which was set out at full length in *Manning's* Digest. There was no other report of the case, but the precision with which the Order was drawn shewed that the case itself must have been most carefully considered. In *Morris* v. *Ludlam* (4) it was decided that a plea of foreign attachment ought to aver that the Plaintiff was indebted to the Defendant within the *City*. In *Crosby* v. *Hetherington* (5) it was held that it must be stated in a plea of payment under a foreign attachment that the garnishee was within the jurisdiction of the Lord Mayor's Court at the time of the awarding of the attachment. Lord Chief Justice *Tindal*, adverting there to *Morris* v. *Ludlam* and to *Starkey's* certificate of the custom, said, "It cannot be put higher than a private Act, for it relates only to the City of *London*." Now that was precisely what had before been stated by Lord *Kenyon*, in *Barrymore* v.

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that such goods and chattels may be arrested, and an extent may be made of the debts, then, at the suit and suggestion of such Plaintiff, *such goods and chattels* shall be arrested wheresoever they be found *within the City*, and an extent shall be made of the debts in the hands of the debtors at the peril of the Plaintiff:" see also *Brandon's* Foreign Attachment, App. 209.

(1) See *ante*.

(2) 2 Chit. Rep. 438; 3 Doug. (Rosc. Ed.) 281, *n*.

(3) Man. Dig. 350.

(4) 2 H. Bl. 362.

(5) 4 Man. & G. 933.

Taylor (1). This limitation had always been put upon the custom. In *Halse* v. *Walker* (2) the custom was declared to be bad without a surmise that the stranger who was indebted to the Plaintiff was within the jurisdiction of the Court. In this case, all the persons, and the debt itself, were without the jurisdiction. How then, on the authorities now cited, could the custom be supported?

As to the grounds on which the discretion of the Court may be exercised. In the cases of *Wadsworth* v. *The Queen of Spain*, and *Haber* v. *The Queen of Portugal* (3), though the general rule as to the impossibility of making a foreign sovereign answer in the Courts of this country for anything done abroad in the capacity of sovereign was decided, yet it was also decided that that objection existing to the jurisdiction, it could be insisted on, although there had been a plea (the plea of *nil habet*) put in by the garnishee. And farther, it was decided that the motion for the prohibition might be made by the sovereign prince, though such prince had not appeared in the Mayor's Court, and though the garnishee had not pleaded. On every point of practice, therefore, that case was decisive of the present.

The Act of 20 & 21 Vict. c. clvii., shews by its provisions that it was only intended to deal with a custom which was locally confined to the *City* and the citizens. Mr. *Brandon* (4) himself shews that the Plaintiff's debt is not brought into issue by the foreign attachment, and yet he assumes that a stranger, merely found in the *City*, may have execution levied upon him for a debt which he cannot dispute, and which, if afterwards disputed by the person alleged to be the original debtor, may be disproved. So that he is to suffer for the alleged debt of another, which debt he may not disprove, and cannot call on the Plaintiff to prove, though, in fact, it may have no existence at all. Such a custom is unreasonable, and cannot be supported.

It may be as contended on the other side, that though a legal commencement must be shewn for a prescription, the same strictness does not apply to a custom, as in *Gateward's Case* (5), but

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(1) 1 Esp. 326.

(2) Vin. Abr. "Customs of *London*," K. pl. 3.

(3) 17 Q. B. 171.

(4) "Review of the Judgments," &c., 67, 102.

(5) 6 Co. Rep. 61.

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Sir *F. Kelly* replied:—

In not one of the cases cited on the other side, had the question been raised whether the custom was itself valid or void. They all depended on other matters, such, for instance, as the mode of pleading, or the time of pleading, and could not therefore be treated as authorities on the present question. The two cases of *Wadsworth* v. *The Queen of Spain*, and of *De Haber* v. *The Queen of Portugal* (1), were really dependent on the question whether the exercise of the sovereign rights of a foreign monarch by acts performed by her in her own dominions could be brought into discussion here. Such cases could not be made to apply to one like the present, and decided nothing either as to the principles which ought to govern this case, or the course of practice that ought to be observed in it.

LORD CRANWORTH moved that the following questions be put to the Judges:—

1. Whether the plea was a sufficient answer to the declaration?
2. Whether the garnishees in the Lord Mayor's Court could maintain an action for a prohibition without having pleaded in the Lord Mayor's Court?

1867 May 8. MR. JUSTICE WILLES:—

C.P. 711

My Lords,—In answer to the first question, we are all of opinion that the plea was not a sufficient answer to the declaration.

The declaration alleges that Messrs. *Buckmaster* sued *Farquharson* in the Mayor's Court for an alleged debt; that there was process against *Farquharson*, and a return of *nihil;* that process of foreign attachment was then issued against the Messrs. *Cox*, the now Plaintiffs, as alleged debtors of *Farquharson*, to which process they appeared; and that none of the parties resided, nor did either of the alleged debts accrue, within the jurisdiction of the Mayor's

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(1) 17 Q. B. 171.

Court. It then goes on to state, that nevertheless the Mayor's Court "did assume to have and did take upon themselves jurisdiction in the premises, and did proceed with the said garnishment," &c.; and it prays prohibition.

The plea admits, and indeed re-asserts, the alleged assumption of jurisdiction. It also admits, inasmuch as being in confession and avoidance it does not deny, the averments that neither of the parties nor the garnishee resided, nor did either of the debts accrue, within the jurisdiction. It does not allege any jurisdiction over the debt alleged to be due from *Farquharson,* and the presumption (as will be presently shewn) is against such jurisdiction. But it states an immemorial custom in case of any plaint of debt levied in the Mayor's Court, followed by process and a return of *nihil,* then to attach the Defendant by any debt due to him from any other person "*found within* the jurisdiction of the said Court;" and after four defaults of the Defendant, then to award execution against the garnishee to pay the Plaintiff, he giving security by sufficient pledges to restore to the Defendant the sum attached if he within a year and a day comes into Court and disproves or avoids such debt; and if the sum attached be not sufficient, then the Plaintiff is to have process against the Defendant for the residue. The plea then states the proceedings against *Farquharson,* the returns of *nihil,* the defaults, and that process of foreign attachment was granted at the prayer of Messrs. *Buckmaster* against Messrs. *Cox,* the now Plaintiffs, "being then *found within* the *City;*" by which process they were in the first instance ordered to retain the alleged debt in their hands, so that *Farquharson* might be attached thereby, and at last they were ordered to appear and shew cause why *Buckmasters* should not have execution against them for the debt; whereupon they appeared and imparled. And the plea ends with a conclusion of law from the previous facts, viz. "by means whereof the said Court had jurisdiction over the said plaint and proceedings, and over the said garnishment, and over the Plaintiffs in the action as garnishees, and over the said *Farquharson;*" in short, claiming jurisdiction because the debtor of the debtor was "found" within the *City,* though none of the parties resided therein, and though there was no jurisdiction in respect of the original cause of action. There can be no doubt

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that this construction of the plea is the just one, for it is adopted in the rejoinder.

Such being the plea, it appears to us to be bad, because the custom relied upon transgresses the local limits; and the customary proceeding is avowedly accessory to a limited jurisdiction, and is incongruous, and therefore void, as setting up an accessory more extensive than the principal.

10 CB 382

All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized, is an usurpation of the prerogative, and a resort to force unwarranted by law. Upon both grounds, viz., the infringement of the prerogative, and the unauthorized proceeding against the individual, "prohibitions by law are to be granted, at any time, to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary" (1).

And not only does the common law give remedy for any excess of jurisdiction, but in respect of inferior Courts attaching the bodies or goods of persons not resident within their jurisdiction, but only temporarily passing through it, the Legislature has provided a special and cumulative remedy by the *Statute of Westminster the First*, which enacts "of great men and their bailiffs and others (the King's officers only excepted, unto whom especial authority is given), which at the complaint of some or by their own authority attach others passing through their jurisdiction with their goods, compelling them to answer upon them upon contracts, covenants, and trespasses done out of their power and their jurisdiction, when indeed they hold nothing of them, nor within the franchise where their power is, in prejudice of the King and his crown and to the damage of the people, it is provided, that none from henceforth so do; and if any do, he shall pay to him that by this occasion shall be attached his damages double, and shall be grievously amerced to the King."

The "great men" (*hautes homes*) in this statute include mayors of cities and boroughs (2). Their "bailiffs" (like the Queen's bailiffs of *Guernsey* and *Jersey*) "are taken for the judges of their

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(1) *Articuli Cleri*, 3 Jac. 1, Answer to 3rd Objection, 2 Inst. 602.
(2) 2 Inst. 229.

Courts" (1). The King's officers "mean the King's justices in his general Courts of justice" (2). And Lord *Coke's* Commentary on the *Statute of Westminster* (2) seems to describe the very sort of custom set up in this plea, where he says, "The mischief before this statute was that great men and others that had *particular* jurisdiction and power to hold plea of contracts, covenants, and trespasses made or done within a certain precinct, as within a manor, *city*, or borough, would attach others by their goods to answer in their Courts of contracts, covenants, and trespasses made or done out of their power or franchise, pretending the same to be transitory, and suppose the same to be done within their power or franchise, which was to the prejudice of the King and his crown in levying his fines in actions of debts and trespasses *vi et armis*, and amerciaments and other profits upon a false supposal, not like to the general jurisdiction and power of the King's justices of the Common Pleas throughout the whole realm. . . . And the statute saith farther, and to the *damage of the party* being attached and sued as he is passing and travelling within that precinct, upon a false supposal, when in truth he ought not." So that if the custom now set up did in fact prevail before the *Statute of Westminster*, it was not only void by the common law, but was also by that statute declared to be illegal.

The form of writ upon this statute is in the Register (3), and also in *Fitzherbert, Natura Brevium* (4), with the following comment:—"If bailiffs, mayors, or others who claim jurisdiction to arrest a man upon a plaint before them, or to attach his goods, &c., do arrest one for trespass or contract, who was not within their jurisdiction, the party arrested, &c., shall have a prohibition directed unto them, &c.," and the form is such:—"*Rex ballivis A. de N. salutem. Cum de communi concilio regni nostri provisum sit, quod non liceat alicui de eodem regno, nisi nobis et ministris nostris, specialem authoritatem ad hoc habentibus, aliquem per ballivam seu potestatem suam transeuntes attachiare, ad respondendum alicui super contractibus conventionibus seu transgressionibus aliquibus, extra eandem ballivam seu potestatem factis, vobis præcipimus quod non attachiatis B. ad respondendum alicui coram vobis in ballivâ vestrâ*

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(1) 2 Inst. 229.

(2) Ibid. 230.

(3) Page 98a.

(4) Pages 106 (45).

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super hujusmodi contractibus, conventionibus, seu transgressionibus, contra formam provisionis prædictæ." And if they will not obey the same, he shall have an attachment against the bailiffs. "And this writ lieth as well upon attachment of goods as for arresting of the body."

Therefore the plea is bad both by the common law and the statute, unless *London* is exempt; and, accordingly, much reliance was placed upon the exceeding antiquity and greatness of the City of *London,* all which will be found discussed in *Hallam's* Middle Ages (1). One writer, indeed, professes to trace back *London* customs to those of *Troy* herself, "*regias consuetudines maximæ Trojæ*;" but this *Spelman* doubts (2). Also (3), Lord *Coke* speaks of the excellency of *London,* and of its being mentioned in the laws of *St. Edmund* as "*caput regni et legum*;" and of the antiquity of the Court of the Husting, which was earlier than the division of the *Aula Regis,* and therefore adjourned a case of foreign voucher which ousted its own jurisdiction to the Justices in *Eire,* and not to the Common Pleas. But in the same breath, Lord *Coke,* after mentioning (4) that the Court of the Husting, or *Domus placitorum,* is "the greatest and highest Court in *London,*" goes on to say that other cities "have like Courts, and so called, as *York, Lincoln, Winchester,* &c." At another place (5), he speaks of the Mayor's Court as "inferior Court,"—"the Court in *London,* or any like inferior Court;" and that with a circumstance shewing that he meant absolutely, not merely relatively inferior. So in *Comyn's* Digest (6), the Mayor's Court is said to be a Court for all actions "arising within the liberties of *London.*" And in *Reg.* v. *The Mayor of London* (7), upon a mandamus to admit an attorney to the Mayor's Court, as being an "inferior Court" within the *Attorneys Act,* it was (after some hesitation, in the Queen's Bench (8)), fully admitted in the Exchequer Chamber (9) by the counsel for the *City* (the present distinguished Recorder) that the Court was an inferior Court. It was so decided to be by the

8 CP 111,

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(1) Vol. iii., pp. 22 to 26, and note v. to p. 26.

(2) Glossary, *sub voce* Hustings.

(3) 2 Inst. 322, 327

(4) Ibid. 321.

(5) 2 Inst. 325.

(6) Courts O 3.

(7) 13 Q. B. 1.

(8) Ibid. 17.

(9) Ibid. 40.

Court of Queen's Bench, Lord *Denman* (who had been Common Serjeant) stating, in delivering the judgment of the Court, "A great many authorities have been cited shewing peculiar practice and peculiar jurisdiction in the Mayor's Court, but none shewing that it did not come within that class of Courts called inferior. Its jurisdiction is limited, the cause of action must be alleged to have accrued within it. In *Jordan* v. *Cole* (1), it was considered, without doubt, to be an inferior Court within 19 Geo. 2, c. 70, s. 4. It has, in short, all the incidents that distinguish an inferior from a superior Court." The correctness of this decision was taken for granted in the Exchequer Chamber, although, for a formal defect in the mandamus, the judgment in the Queen's Bench was reversed.

Diligent search has been made without finding any trace of the Mayor's Court being classed with the superior Courts of general jurisdiction, of which the Courts at *Westminster* are bound to take judicial notice, such as those of the counties palatine, where the Count had *Jura Regalia*, and held "*ita libere ad gladium sicut Dominus Rex tenebat Angliam ad Coronam.*" On the contrary, we find that the Mayor's Court has always been classed with the Courts of other cities and boroughs; and we are persuaded that the pretensions raised in this case, not being warranted by any book, and being negatived by many, are unfounded.

Nor does the repeated confirmation by statute of the customs of the *City* make any difference. Once confirmed, or twenty times confirmed, they are no more than confirmed; and this was done by *Magna Charta*, c. 9, for all such customs. "The City of *London* shall have all the old liberties and customs which it hath been used to have. Moreover we will and grant that all other cities, boroughs, towns, and the barons of the five ports, and all other ports, shall have all their liberties and free customs." Upon which, and like statutes, confirming customs in general terms, it is to be observed that they do not establish customs which would not of themselves have stood the test of law, as being ancient and reasonable, but only make up for any such defect, as forfeiture, surrender, express or implied, or other break in the existence of the corporate body. This appears by the comment on *Magna*

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(1) 1 H. Bl. 532.

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Charta, c. 9, in the *Mirror*, cited by Lord *Coke* (1):—" *Que les citizens aient leur franchise et customes que sont sufferables per droit et nient repugnant al ley. Et le interpretation que est dit de Londres soit entendu des cinque ports et des autres lieux.*" To the same effect is *Comyn's* Digest (2). And a custom originating within time of memory, or an unreasonable custom, even though existing in fact, is void in law. Therefore *Dean*, who called *Garrett*, an alderman, " fool and knave," upon the *Royal Exchange*, and was, pursuant to the alleged custom of the *City*, committed to *Newgate* by the Mayor until he should find sureties for his good behaviour, was discharged by the Court of Common Pleas upon a *habeas corpus*, *Dean's Case* (3); and in *Lewisse* v. *Masters* (4), Lord *Holt*, speaking of this very custom of foreign attachment, which it was then sought to extend to attaching a debt in the hands of a debtor of an intestate before administration granted, said that, " There can be no custom to support this case; for customs that overthrow principles of law, and which are unreasonable, are to be rejected." To the same effect is *Matthey* v. *Wiseman* (5), where it was again attempted to enforce foreign attachment against a dead man.

Nor does the local Act of 20 & 21 Vict. c. clvii. help. Indeed, that Act assumes, if it does not assert, that the Court is an inferior Court of limited jurisdiction, although it enlarges in some respects its powers as such; as, for instance, in sect. 13, as to process; sect. 32, as to where the Court may act; sections 38 and 48, as to executing process out of the jurisdiction. And it expressly speaks of the Courts of *Westminster* as " superior," an epithet which it nowhere applies to the Mayor's Court. But this question of whether an Act of Parliament, recognising the jurisdiction of the Court, converts it into a superior one, was raised and decided in the negative as to the *Liverpool* Borough Court: *Laughton* v. *Taylor* (6).

7 Ex 289

In this local Act there are neither express words nor necessary implication to produce the prerogative effect of creating a superior Court, and, in effect, a new palatine jurisdiction. Far different was the language used in the public Act of 20 Vict. c. 65, to put

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(1) 2 Inst. 20.
(2) London, M.
(3) Cro. Eliz. 689.
(4) 5 Mod. 75.
(5) 18 C. B. (N.S.) 657, 11 Jur NS 603
(6) 6 M. & W. 695.

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the Admiralty Court upon the footing of the superior Courts. When this is done for the *City* Courts it will doubtless be by a public measure, which shall associate the Judges to those of *Westminster Hall*, and which (following the policy acted upon since the time of *Henry* VIII., at latest), shall vest their appointment in the Crown, whilst the judicial customs of *London* shall either be abolished as antiquated, or extended to all other Courts as beneficial.

20 Eq 10

The only section in the Act which requires separate attention is the 15th, by which "no Defendant shall be permitted to object to the jurisdiction of the Court, by any proceeding whatsoever, except by plea." This section, however, does not preclude the application for a prohibition by the garnishee, who, throughout the custom and the Act, is recognised as distinct from the Defendant. Indeed, it may be doubted whether the attention of the Legislature was called to the indirect effect attributed to that section in *Manning* v. *Farquharson* (1), of taking away from the Defendant in the Lord Mayor's Court the right of moving for a prohibition because of want of jurisdiction. If the matter were *res nova*, it might be thought that the section only took away from the Defendant proceedings which he individually possessed the right to take as suitor or party aggrieved, such as arrest of judgment, error, or action, and not prohibition, to which not only he, but the Crown, or any subject, even the Plaintiff, might have resorted. It is, however, unnecessary to criticise the opinion of *Crompton*, J., in *Manning* v. *Farquharson*, because, as explained by that very learned Judge in his judgment in this case when in the Exchequer Chamber, it does not affect the garnishee.

20 Eq 4

The conclusion that the Court is inferior has a double application, first, to the construction of the plea in this case, because "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged:" *Peacock* v. *Bell* (2). And, secondly, as touching the question whether the plea mentioned in sect. 15 is to be a dilatory plea, admitting the general jurisdiction of the Court, but exempting the Defendant upon special grounds, or a plea in bar, upon the ground that the jurisdiction of the Court is limited to a class within which the particular claim does not fall.

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(1) 30 L. J. (Q.B.) 22.
6 Jur NS 1300

(2) 1 Wms. Saund 101r.

It is necessary to take the exact measure of the dilatory plea to the jurisdiction, properly so called (now very rare), which admits the general jurisdiction of the Court, but states a special exemption of the individual Defendant, or special privilege of the place in which the cause of action arose, because, in many instances, besides those cited for the Plaintiffs in Error, before the law was well settled, a plea in mere denial of a cause of action within the local limits of the jurisdiction was incorrectly assumed to fall within the same rules.

A plea that matter within the general jurisdiction of a superior Court is, by reason of special privilege, exempt therefrom, and subject to another Court, as, for instance, that land is in ancient demesne, or a bond made, as it appears by the date, within a county palatine: *Comyn's* Digest (1); or that the Defendant is privileged by office, must shew a Court in which the suit may be effectually prosecuted, according to the rule that "whoever pleads to the jurisdiction of one of the King's superior Courts of Record of general jurisdiction must shew what other Court has jurisdiction" *Rex* v. *Johnson* (2); and that the Defendant "dwelt there, or had whereby to be attached there:" *Smith* v. *Sephton* (3); so as to shew that the exercise of the general superintending jurisdiction of the superior Court is unnecessary. Such a form of plea is always unnecessary and out of place in an inferior Court; and even in a superior Court it is unnecessary and out of place, when the objection is that the limits of local jurisdiction are transgressed.

As an instance of the mode in which pleas of this kind were dealt with, and of the recognised distinction between the two classes of Courts, reference may be made to *Jennings* v. *Hankyn* (4), where the action was brought in the Court of King's Bench against an executor upon a bond of the testator made and dated in the county palatine of *Chester*. The Defendant pleaded in bar or chief *plene administravit*, and after verdict and judgment for the

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(1) Franchises D. 9.
(2) 6 East, 583.
(3) Comb. 115.
(4) Carth. 11.

Plaintiff the Defendant moved in arrest of judgment, "To which it was answered, and so adjudged by the Court, that the Defendant had lost that advantage which he might have if he had not pleaded in chief, for he ought to have come in time and pleaded to the jurisdiction. But now he is foreclosed to say anything against it, having admitted the jurisdiction by pleading in chief; for this Court (King's Bench) is not, like one of a limited jurisdiction holding plea of a cause arising without, for in such case all is void, as *coram non judice*, but it is of an universal jurisdiction and superintendency, and the county palatine itself was derived out of the Crown;" and the judgment for the Plaintiff stood. The same doctrine was held in *Lord Coningsby's Case* (1).

In an inferior Court, on the contrary, the objection that the declaration does not shew that the cause of action arose within the jurisdiction (unless cured by custom or statute) is fatal in arrest of judgment or upon error: *Trevor* v. *Wall* (2). And whether the declaration states that the cause of action arose within the jurisdiction or not, a plea in chief denying the debts puts in issue, by implication, whether the debt was within the jurisdiction, and the Plaintiff must fail at the trial unless he prove a debt of that description: *Williams* v. *Gibbs* (3).

And even in superior Courts themselves, where the subject matter is such as to imply a local limit of jurisdiction, the exception is peremptory; there is no necessity for a dilatory plea, nor is the objection waived by pleading in chief. Thus, if an action of trespass to land situate abroad were brought in the Queen's Bench, the Defendant need not plead a dilatory plea shewing what Court has jurisdiction; but if the foreign locality appeared upon the count he might demur; and if it did not appear he might plead in chief or bar a denial of the trespass, (which would be assumed as alleged within the jurisdiction,) and at the trial the Plaintiff would be nonsuited or lose the verdict; and whether upon demurrer or plea the ordinary judgment would be given for the Defendant: *Doulson* v. *Matthews* (4).

To the same class seem to belong cases in which the character of the transaction is incompatible with the exercise of civil jurisdic-

(1) 8 Mod. 20.

(2) 1 T. R. 151.

(3) 5 Ad. & E. 208.

(4) 4 T. R. 503.

tion, as raising a question of prize: *Lecaux* v. *Eden* (1); or other warlike taking: *Buron* v. *Denman* (2); or of state: *Duke of Brunswick* v. *King of Hanover* (3); and *Munden* v. *Duke of Brunswick* (4), where the plea was special.

Of the same character is the plea in cases where a statute gives to an inferior Court exclusive and not merely concurrent jurisdiction, whether it expressly gives a plea in bar or not. Such was the 23 Geo. 2, c. 27, s. 21 (the *Westminster Court of Requests Act*), which enacted that no action for any debt not amounting to 40*s.* recoverable in the Court of Requests should be brought against any person residing within the jurisdiction thereof in any other Court, and gave the Defendant a plea in bar: *Taylor* v. *Blair* (5). And to the same effect was *Parker* v. *Elding* (6), where the Act (the *Isle of Ely Small Debts Act*) did not in terms give a plea in bar; but the Court held that the exception was from its nature in bar. In *Taylor* v. *Blair*, Lord *Kenyon*, comparing the effect of the statute upon the jurisdiction of the superior Court to the ordinary limitation of the jurisdiction of an inferior Court, said, that "As in the instances of actions brought in an inferior Court, where the cause of action must be proved to have arisen within its jurisdiction, if the Defendant makes an objection at the trial for want of such proof, he is entitled to a verdict, or to insist that the Plaintiff shall be nonsuited; but if no such objection is made, and the cause of action is laid in the declaration to arise within the jurisdiction, he cannot after verdict against him take advantage of its not being proved, either by a *false judgment* or a *writ of error*, because the defect does not appear upon the record."

5 Ex 231

Another distinction is, that whereas the judgment of a superior Court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an inferior Court, involving a question of jurisdiction, is not final. If the decision be for the Defendant there is nothing to estop the Plaintiff from suing over again in a superior Court, and insisting that the decision below had turned, or might have turned, upon jurisdiction. If the decision were in favour of the Plaintiff it is still not conclusive, because "the rule, that in inferior Courts and proceedings by magistrates the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction, never has been questioned:" *per Holroyd,* J., *Rex* v. *All Saints, Southampton* (1); *Rex* v. *Bolton* (2); *Chew* v. *Holroyd* (3), *per Parke,* B.

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(1) Doug. 594.
(2) 2 Ex. 167.
(3) 2 H. L. C. 1.
(4) 10 Q. B. 656.
(5) 3 T. R. 452.
(6) 1 East, 352.

And, therefore, not only must the declaration in the inferior Court allege jurisdiction, but also, in an action brought in a superior Court upon a judgment of an inferior Court, duly obtained, it must be again averred that the original cause of action arose within the jurisdiction of the inferior Court, so that upon a traverse of that averment the question of jurisdiction may be re-tried. This was finally settled in *Read* v. *Pope* (4), where, in consequence of the precedents not being uniform, Lord *Lyndhurst,* C.B., consulted all the Judges. And in *Briscoe* v. *Stephens* (5), the question arose in a singular way, because, in answer to an action for a debt, the Defendant pleaded a suit by the Plaintiff for the same cause of action in an inferior Court; to which the Plaintiff replied that the parties resided, and the cause of action accrued, out of the jurisdiction; and this replication was held sufficient,—a conclusion seemingly paradoxical, but correct, because, for the reason already given, the judgment of the inferior Court could not be sued upon; and, for that presently to be assigned, the process of the inferior Court could not safely be enforced.

There is yet another difference worth noticing between Courts of general and Courts of limited jurisdiction, namely, that the Plaintiff is liable to an action for executing the process of an inferior Court in a matter beyond its jurisdiction, and cannot justify under such process, whether he knows of the defect or not; and that the Judge and officer are liable to a civil action if they knew of the defect of jurisdiction: *Moravia* v. *Sloper* (6); *Carratt* v. *Morley* (7); *Andrews* v. *Marris* (8); *Houlden* v. *Smith* (9).

The exception of cause of action arising out of the jurisdiction

(1) 7 B. & C. 785.
(2) 1 Q. B. 66.
(3) 8 Ex. 249.
(4) 1 C. M. & R. 303.
(5) 2 Bing. 213.
(6) Willes, 30.
(7) 1 Q. B. 18.
(8) Ibid. 3.
(9) 14 Q. B. 84.

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has sometimes been confounded with what is properly a "foreign plea," namely, a plea of some affirmative matter of defence, such as payment or release made out of the jurisdiction, which under the old law of venue the inferior Court could not try, even though it was competent to entertain the suit. The distinction, however, between defect of jurisdiction and defect of power to try a particular issue, is obvious and familiar. The superior Courts were hampered by a like difficulty in the early cases upon maritime contracts (1); and traces of it remain to this day in local actions: *Richards* v. *Lockonin* (2).

The case of *Lucking* v. *Denning* (3) was much relied upon for the Plaintiffs in Error. It was an action against a serjeant of mace for the escape of a Defendant out of custody upon process of the Sheriffs' Court of *London*. At the trial it appeared that the bond upon which the original action was brought had been made out of the jurisdiction, whereupon the serjeant-at-mace objected that he was not liable for the escape. To which answer was made, that the objection did not lie in the mouth of a ministerial officer, who is justified in executing the process which he does not know to be unfounded. Had he known of the defect, and therefore discharged the Defendant, this reasoning would not apply, and the decision could not stand with *Roll.* Abr. (4); *Squib* v. *Hole* (5); and the authorities cited in the judgment in *Briscoe* v. *Stephens.* The case is therefore inapplicable; and the dicta of the Court as to a distinction between a jurisdiction limited as to things, (which cannot be enlarged by waiver,) and a jurisdiction limited as to things within a limited place, and that in the latter class the objection to the jurisdiction is waived by pleading in chief, are not correct even as to superior Courts. The dicta as to the judgment being an estoppel as to jurisdiction are wrong as to inferior Courts. These and similar dicta to be found in the books, as in *Sparkes* v. *Wood* (6) and elsewhere, originated in the pleading mistakes already explained, and are contrary to the series of authorities from Lord *Kenyon's* time downwards, already detailed.

Thus it appears that as the local Act does not in terms create, so it does not impliedly recognise, a general jurisdiction. Its utmost effect is to restrict the Defendant to one of the various modes of raising the objection that the Mayor's Court has no jurisdiction, leaving the Court local and inferior, and subject to be restrained by prohibition, upon the application of the Crown, or any of its subjects not disabled by the Act; and more especially, as in this case, upon the application of the garnishee to stay the proceedings against him, if they be unauthorized; which depends upon the validity of the custom as pleaded.

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(1) M. 21 E. IV. 10, pl. 23.

(2) 34 L. J. (Q.B.) 225; 6 B. & S. 777. (a)

(3) 1 Salk. 201.

(4) Escape, F. 3.

(5) 2 Mod. 29.

(6) 6 Mod. 146.

(a) S.C. nom. Richardson v. Lochlin 11 Jur. N.S. 951.

The custom of foreign attachment, like other customs, must be local in order to be valid. *Cowell* says (1): "Foreign attachment is an attachment of foreigners' goods found within a liberty or a city for the satisfaction of some citizens to whom the foreigner is indebted." So that "foreign" and "foreigner" do not mean alien, as suggested, but merely not civic. The proceeding must have originated in times when mesne process was by summons, and upon *nihil* returned, then either by capias to imprison the Defendant, or by distringas to compel him to render himself to prison or give bail to the action, the suit was enforced: *Comyn's* Digest (2). These processes could only be executed within the jurisdiction. And the custom of foreign attachment only extends the distringas to debts, of which it restrains the payment until the Defendant surrenders or puts in bail; and after a return or returns of *nihil*, and a default to surrender or put in bail, it makes the garnishee unless he shew cause to the contrary) pay the claimant instead of the Defendant, upon security to pay over to the Defendant if within a year and a day he "disproves" the debt.

Therefore the very terms of the custom condemn proceedings against a person who owes nothing in *London;* it makes no provision for notice; indeed, its efficiency is said to depend upon no notice being in fact given to the Defendant. It proceeds without notice upon a return or returns of *nihil*. Upon that foundation of *nihil* it discharges the Defendant's debtor of his liability, hands over the amount to the claimant, without proof, or upon proof *ex parte*, upon security, but security to which the Defendant has no opportunity of objecting, to return the amount if the Defendant

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(1) *Voce* Foreign Attachment.

(2) Process, D.

"disproves" the claim within a year and a day. Unless, therefore, the Defendant was originally bound to pay in *London*, under what pretence can these penalties be imposed upon him for not being there, or not having goods to the value there?

In the note to *Turbill's Case* (1), Serjeant *Williams* says, that "a custom has been said to prevail not to summon the Defendant, or give him any notice of the plaint; so that the attachment issued without his privity or knowledge. This custom, however, has been exploded, as being contrary to the first principles of justice; and a judgment of foreign attachment, which appears to have been given without a summons and *nihil* returned, was adjudged to be erroneous and void; for inasmuch as the attachment is founded upon the default of the Defendant's appearance to the plaint, how can he be said to have been guilty of a default of appearance if he has never been summoned to appear?"

It seems strange that this conclusive reasoning should be considered as displaced by the now practice of pretended notice, by issuing process, and procuring a formal return of *nihil*, a proceeding which may be just if limited to those who contract debts within the jurisdiction, and go away without paying, but a proceeding merely colourable if applied to strangers, and one that may lead in their case to serious annoyance and wrong, apart from the exercise of unlawful authority. And the reasoning which governs the case of no summons being issued is equally applicable to the case of a summons issued for a debt not within the jurisdiction, which the Court has no warrant to issue, and which, being itself a wrong, cannot be the foundation of a right.

It is quite obvious, therefore, that the custom of foreign attachment cannot in reason apply to debts or garnishees out of the jurisdiction; and it is so settled by authority. In a note to *Turbill's Case*, it is laid down, that "to give jurisdiction to the Lord Mayor's Court of *London*, it is not sufficient that the garnishee reside within the *City*; the debt due from the Defendant to the Plaintiff must also have accrued there." And in *De Haber* v. *The Queen of Portugal* (2), in which it was vehemently argued that foreign attachment in the Lord Mayor's Court was maintainable in aid of

(1) 1 Wms. Saund. 67, *n*.

(2) 17 Q. B. 171.

a suit brought against a reigning sovereign in respect of an alleged liability in the capacity of sovereign, arising in *England*, but out of the jurisdiction of the Mayor's Court, after deciding in favour of a prohibition upon the ground that the Defendant was sued for an act done in her sovereign capacity, and so out of the jurisdiction, Lord *Campbell* went on to say, that "the circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied upon; nevertheless, after the strong assertions at the bar that this is immaterial when the Defendant does not appear, we think it right to say, that having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to when the cause of action arose within the jurisdiction of the Court from which it issues. The garnishee is safe by paying under the judgment of the Court; but the objection that the cause of action did not arise within the jurisdiction of the Court, if properly taken, must prevail. No agreement of counsel to abstain from making the objection can alter the law of the land, which says, that an inferior Court can only hold plea when the cause of action arises within the local limits to which its jurisdiction, by charter or custom, is confined."

It has been said that this process may be a means of annoyance and wrong to strangers and foreigners. No later than last Trinity Term (1866), notwithstanding the judgments in the above case of the Queen of *Portugal*, and that of the Queen of *Spain* to the same effect, it was found necessary to apply to the Court of Common Pleas to prohibit foreign attachments in the Lord Mayor's Court against the *Peninsular and Oriental Steam Packet Company*, in respect of funds belonging to *Ismail Pasha*, who was sued in that Court for an alleged Egyptian debt. And the same attempt has been repeated, and a rule for a prohibition granted, in *Melanidis* v. *Ismail Pasha* (*Larkin*, garnishee) (1).

These were cases in which the parties were able to vindicate their rights, and felt but little the expense or the vexation, yet they have brought scandal upon our law. A more serious question might arise in the case of a private individual casually within the jurisdiction where foreign attachment prevails, and called upon at

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(1) Hilary Term, 1867.

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a distance to pay some one else's debt out of money which he is alleged to owe, but which his creditor has not asked for, and the liability for which may depend upon a settlement of accounts which he must go home before making, and which he may be compelled to pay without inquiry, or to litigate at a disadvantage. A foreign banker, of whom as banker it may be said "*pecunia est alter sanguis*," passing through *London*, may be called upon, at the suit of some other foreigner, of whom he never heard, and the validity of whose claim he is not to be permitted to dispute, to pay in *London* in cash what he might at home have paid in paper; and if, to get rid of annoyance, or relying upon English justice, he pays, his customer may afterwards insist, either in an English Court that he knew of the invalidity of the claim, and so colluded with the creditor, or in a foreign Court that the debt or the party was not subject to the jurisdiction.

A foreign merchant, say at *New York* or *San Francisco*, opens an account at *Lafitte's*, or at *Coutts's*, to meet bills which he has accepted, to pay for French or English merchandise. Is it to depend upon whether *Lafitte* happens to visit *London* and walk into the *City*, or whether *Coutts's* do business in the *City* through one of the firm, or only through the intervention of a clerk, that the Mayor's Court shall have jurisdiction to attach the balances in *Paris* or in *London* to answer a foreign claim, which may be bad or indifferent, but is good enough to procure the dishonour of the bills, and to destroy the foreign merchant's credit before he can take means to dissolve the attachment? The Defendant may have an answer, by way of payment, or release, or discharge by the law of his own country, which he may despair of establishing according to the rules of evidence used in a foreign jurisdiction; or a bar by way of prescription, which, as being matter of procedure, will be inadmissible there. The place where he is sued may thus be all-important; and shall it depend upon the will of his debtor, who is in default, to elect for him a jurisdiction? That would be to affect *A.* by the unauthorized act of *B.*, over whom he has no control; and therefore it is not merely different from law, which a valid custom may be, but contrary to a principle of justice, which no valid custom can be.

18 Eq 345.

So stands the matter upon reasoning; and the cases cited to prove that foreign attachment may extend to process for debts beyond the jurisdiction: *Banks* v. *Self* (1); *Harington* v. *M'Morris* (2) are wholly inapplicable. They shew the course of pleading in the case of a garnishee, who, without collusion, and in ignorance of the want of jurisdiction, has paid under compulsion of the attachment, and is afterwards sued by his own creditor. In such a case, although the proceeding in the Mayor's Court was wrong, yet the garnishee, not being party or privy to the wrong, and paying honestly in obedience to process of law apparently valid, has the same protection as an officer who executes process apparently regular, without knowing of the want of jurisdiction; and who, not being in a condition to resist, is protected, not because the proceeding was well founded, but notwithstanding it was ill founded: *Westoby* v. *Day* (3); *Wood* v. *Dunn* (4). This very distinction between the Plaintiff in the inferior Court and the garnishee, "who is a third party, and no way privy," was pointed out in the case relied upon by Mr. *Pollock*: *Banks* v. *Self* (5).

And as for the doctrine of *Macdaniel* v. *Hughes* (6), that it is not necessary for the garnishee, in order to his discharge, to prove any debt, if that decision does not rest upon the ground of submission by the garnishee to process of law apparently valid, without knowledge of its groundlessness, or upon the special ground that the Defendant had actual notice, and an opportunity of contesting the debt, but declined to do so, instead of its proving that there should be no limit to the custom, and no means of staying the proceedings as unwarrantable, it furnishes an argument for either abolishing or restricting within the narrowest bounds of locality a usage which, in favour of a dishonest claimant, violates the first principles of justice. If there must be a debt within the jurisdiction, of course there must be a debt to found the jurisdiction as against the garnishee; just as to ground the jurisdiction of the Spiritual Court in a cause of church rate there must be a valid church rate and a liability thereto; otherwise, if the defence is rejected, a prohibition lies. The cases upon this subject are col-

7 App. Cas 241

12 Ju. N.S. 338

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(1) 5 Taunt. 234.

(2) Ibid. 228.

(3) 2 E. & B. 605, 18 Ju. 10

(4) 36 L. J. (Q.B.) 27; Law Rep. 1 Q. B. 77; Law Rep. 2 Q. B. 73.

(5) 5 Taunt. 234, *n.*

(6) 3 East, 367.

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lected in the judgment of *Tindal*, C.J., in *Burder* v. *Veley* (1). There the argument was, "Why not appeal?" Here it is, "Why not pay?" The answer is, "I am harassed by process which is unauthorized, and I choose to protect myself by prohibition." There can be no just attachment without a debtor, and a debtor liable: *Bro. Abr.* (2). And if there is no just attachment, there is an unjust vexation of the garnishee, who is not asked for payment by his own creditor, and could not be sued by him.

It was said that this jurisdiction is exercised in other Courts without objection, and therefore why not in *London?* No instance, however, was cited in which jurisdiction has been exercised as to debts accruing out of the jurisdiction, to enforce debts accruing out of the jurisdiction as between litigants out of the jurisdiction; and there are instances the other way.

The law of *Scotland* was referred to, and your Lordships will be better able to say how far it furnishes analogy. It may be observed however, that in *Wadsworth* v. *Queen of Spain* (3), Lord *Campbell* spoke of the law of *arrestment fundandæ jurisdictionis causâ* in *Scotland* as applicable to the case of debts within the jurisdiction, and there is nothing in the case, the *London and North-Western Railway Company* v. *Lindsay* (4), where the creditor and the garnishee were Scottish, or the cases therein referred to, to shew that even the Court of Session, a superior Court of general jurisdiction, would, at the suit of a foreigner for a foreign debt, assume jurisdiction over a man residing in *England*, who had no property in *Scotland*, and had contracted no debt there, simply because a debtor of his, whose debt accrued out of *Scotland*, went upon a passing excursion into that part of the kingdom. If that Court could do so it must be because of the jurisdiction being general, and residence not being required; whereas in our local Courts the general rule is said to be, that the person proceeded against must be resident: *Grigg's Case* (5); *Tubb* v. *Woodward* (6); *Smith* v. *O'Kelly* (7); judgment of *Parke*, B., in *Bailey* v. *Chitty* (8); and the judgment in *Williams* v. *Jones* (9).

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(1) 12 Ad. & E. 309.

(2) London, 16.

(3) 17 Q. B. 191.

(4) 3 Macq. Sc. Ap. 99. 4 Jur NS 343

(5) Hutton, 59.

(6) 6 T. R. 175.

(7) 1 Bos. & P. 75.

(8) 2 M. & W. 31.

(9) 13 M. & W. 628.

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Doubtless, from an international point of view, the temporary residence of a man is regarded as sufficient to give jurisdiction, but can this justly be extended to the temporary residence of a man's debtor? The law of the *United States* seems to furnish an answer. In *Gould* v. *Webb* (1), payment under an attachment out of the Supreme Court of *New York*, a Court of general jurisdiction, was successfully pleaded, but with an averment that the Defendant in the original suit and the garnishee were citizens of *New York*, and that the garnishee was resident within the state, and subject to the jurisdiction and process of the Court. And it is to be observed that in *Kent's* Commentaries (2), an account is given of the foreign attachment there called "Trustee Process," (Laws of the various States of the Union); and on page 403, the accomplished commentator says, "It has moreover been held, and very justly, that a person residing out of the state, and coming within it for a temporary purpose, is not liable to be summoned as the trustee" (by us called "garnishee") "of an absconding, concealed, or absent debtor: *Baxter* v. *Vincent* (3); and the same principle applies to the process in *Massachusetts*:" *Roy* v. *Underwood* (4). And in the cases collected in Mr. *Peter's* Digest of the *United States* Decisions, title "Process," to which we can only refer by way of illustration, it is laid down that the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the Court *in personam*; that is, when they are inhabitants or found within the *United States*, or who have concealed themselves or absconded, and not when they are aliens, or citizens resident abroad at the commencement of the suit, and have no inhabitancy there.

The Continental Courts, as a rule, do not entertain suits between foreigners in respect of foreign transactions; nor has any foreign law been referred to or found, where an absent man's debt can be confiscated without notice upon security which he has no opportunity of objecting to, to be returned if he "disproves" that it ought to have been seized.

The appeal made upon this argument to the good sense of mankind therefore seems to fail, and even to result in restriction of the custom to *City* matters, and (even if the jurisdiction were general, which it is not,) to garnishees "*deins le Cite,*" in the sense of dwelling there.

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(1) 4 E. & B. 933. 1 Jur N.S. 21

(2) Vol. ii. p. 401.

(3) 6 Vermont Rep. 64.

(4) 3 Pickering's Rep. 242.

Reference was also made to the attachment sections of the *Common Law Procedure Act* of 1854, sects. 60 to 67, modified by the *Common Law Procedure Act* of 1860, sects. 28 to 31. Those provisions, however, only apply after judgment, which determines jurisdiction and liability, and thus they are widely distinguished. Indeed there is good reason to believe that the Legislature advisedly abstained from adopting foreign attachment upon mesne process, as being a retrograde step towards imprisonment for debt before judgment, in cases where the debt was disputed.

Moreover, the jurisdiction substituted for the proceeding to outlawry upon mesne process (which was a more barbarous and roundabout sort of foreign attachment) against foreigners and British subjects resident abroad, is expressly limited to "a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction:" *Common Law Procedure Act,* 1852, sects. 18 and 19. And proceedings cannot be instituted under that Act without notice or evasion of notice.

The analogies suggested as favourable to the custom thus appear not to bear examination.

The question principally argued at the bar affected the debt sued for, and not the debt of the garnishee, or the position which he occupied: and if the view presented in this opinion be approved it will not be essential to consider these topics. But, as we cannot anticipate the judgment of the House, they will require at least a passing notice.

As to the locality of the debt of the garnishee, it seems strange that the custom should, even collaterally, touch debts accruing out of the jurisdiction; and this difficulty has been perceived and met by a singular and questionable reason, namely, that the locality of the garnishee was the locality of the debt, as if he carried it on his back; but this reason has been accompanied by expressions shewing that the garnishee must, as in the *United States*, be an inhabitant of, and not casually found in, the *City*. Thus in *Andrews*

v. *Clerke* (1), in answer to an objection that the debt of the garnishee arose out of the jurisdiction, it was answered, "that the debt always follows the person of the debtor, and it is not material where it was contracted, especially as to this custom of foreign attachments; for it was always the custom in *London* to attach debts upon bills of exchange, goldsmith's notes, &c., if the goldsmith who gave the note, or the person to whom the bill is directed, *liveth* within the *City*, without any respect had to the place where the debt was contracted." Also in *Tamm* v. *Williams* (2), it is said to have been decided that the garnishee must be resident; and Lord *Kenyon*, in *Barrymore* v. *Taylor* (3), was of that opinion. In the first case in which the custom appears in the Year Books (4), the parties were citizens, and the debts within the jurisdiction, and the custom was then stated by the Recorder *Starkey* to be, that "if the Plaintiff will surmise that another *within the City* ('*deins le Cite*') is a debtor to the Defendant," &c. This is repeated in 1 *Rolle's* Abridgment, 554, pl. 4, as part of the custom; and the same in Serjeant *Williams's* note to *Turbill's Case* (5). In the course of the argument in *Crosby* v. *Hetherington* (6), *Tindal*, C.J., stated, "that the reason of the thing is in favour of the garnishee residing in *London* otherwise one cannot see how the process of the Court can be served;" and he cited *Tamm* v. *Williams* and *Rolle's* Abridgment, 554, pl. 4, as direct authorities that the plea ought to have stated that the garnishee was within the jurisdiction. There was, however, no decision, because the Defendant amended his plea, and the custom alleged in the amended plea was negatived by the certificate. In the report of the same case, in *Scott* (7), Mr. Justice *Maule* points out that the judgment in *Tamm* v. *Williams* was that the garnishee must be in the *City*, though the marginal note is that he must be resident within the *City*. Possibly the reporters may have thought, as apparently did *Tindal*, C.J., that the rule for jurisdiction already referred to was not satisfied by casual presence in the *City*. And in *Day* v. *Paupierre* (8)—where it was held (unfortunately, as many have thought) that notwithstanding the abolition of imprisonment for debt upon mesne process by 1 & 2 Vict. c. 110, the Defendant cannot dissolve the attachment, or defend the action upon an appearance, without surrendering himself to prison, or putting in special bail—in over-ruling an objection made to the return of a *certiorari* to remove a suit into the Queen's Bench, that it did not state that the garnishee resided in the City of *London*, Lord *Denman*, delivering the judgment of the Court said, "A plea stating the custom, and omitting that the garnishee must reside within the *City*, would no doubt be bad, and so was held in *Crosby* v. *Hetherington*."

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(1) Carth. 25.
(2) 3 Doug. 284; 2 Chit. 438.
(3) 1 Esp. 326.
(4) M. 22, Ed. IV. 30, pl. 11.
(5) 1 Wms. Saund. 66a.
(6) 5 Man. & G. 933.
(7) 5 Scott, N. R. 648.
(8) 13 Q. B. 802.

And not only do the authorities and the reasoning especially affecting the custom of foreign attachment look this way, but analogy also points in the same direction. Thus upon the ground that custom is the local law of and for the inhabitants, and not for strangers casually in the place, an attempt to establish by custom a sort of petty *droit d'aubaine*, in the form of a claim to a heriot of the best beast " found " within a manor of a stranger dying therein, was defeated in *Parker* v. *Comberfoord* (1). And *é converso* in *Fitch* v. *Rawlings* (2), where a custom for all inhabitants of a parish to play at lawful games upon a close at seasonable times was held good, as it clearly was: a similar custom for all persons for the time being in the said parish was held bad. In *Tyson* v. *Smith* (3), a custom was held good for all victuallers coming to a fair to erect booths, paying 2*d.* to the lord. But, besides the *quid pro quo*, that custom had a tang of certainty and fixed locality, such as the original return in *Edward* IV.'s time of the custom of foreign attachment as applicable to garnishees *deins le Cite* imported, and such as the modern form in the plea does not import.

It appears, therefore, to be in accordance with authority and good sense to hold that a man who could not be sued in *London* by his own creditor cannot by the mere act of using the Queen's highway through the *City*, whether on his own business or the Queen's, as a juryman at the Central Criminal Court, or a witness at *Guildhall* (for the custom as alleged includes all), become liable to be stayed there under the custom of the place by the alleged creditor of his creditor.

(1) Cro. Eliz. 725. (2) 2 H. Bl. 293. (3) 9 Ad. & E. 406.

Both upon this latter ground, and also upon the distinct ground that the debtor not liable to be sued in *London*, of a creditor not liable to be sued in *London*, cannot, by entering the *City* of his own head, create a jurisdiction against his creditor, the custom as pleaded is bad, and the plea is no answer to the declaration.

This brings us to the second question, whether the garnishees in the Lord Mayor's Court could maintain an action for a prohibition without having pleaded in the Lord Mayor's Court? To which we answer that they could.

The argument for the Plaintiffs in Error was, that either the garnishee was restricted to the plea of *nil habet* and could not plead such matter as the original Defendant might, and therefore could not have a prohibition, or that if he could plead other matter he ought, and cannot be entitled to a prohibition without having done so. The question put to the Judges assumes, and, if we may presume to say so, correctly, that the garnishee could have pleaded in the Court below anything which the Defendant below might have pleaded. It is obvious that whatever the Plaintiff must allege in order to develope his claim to make the garnishee pay money to him, the garnishee must be at liberty to traverse; and it is held that the garnishee may even bring error in respect of a defect of which the Defendant might take advantage: *Bruce* v. *Wait* (1). The garnishee, however, has no right to plead more than one plea in the Court below; and he is not allowed costs there, if successful: *Locke* on Foreign Attachment (2). It is therefore material for him to incur as little expense as may be before applying for a prohibition; and the question is, in effect, whether, if a party entitled to plead in the Court below move for a prohibition instead, it is competent for the Court to grant his application.

In order to look straight at this question we must first shut out certain sources of confusion which have introduced themselves into the argument; and for this purpose we must endeavour to state the law of prohibition distinctly upon points which were mixed up together in the discussion at the bar. As, for instance, it is obvious that our answer must be limited to cases in which there is an absence of jurisdiction, and the prohibition is asked for upon

(1) 1 Man. & G. 1.

(2) Page 8.

that ground, because there are exceptions which, from their very nature, must be first raised in the Court below. These occur in cases where there is jurisdiction over the subject matter, and in which, therefore, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits, *Blaquiere* v. *Hawkins* (1), but in which it will be granted for a denial or perversion of right, such, for instance, as refusal of a copy of the libel, in which case the prohibition is only *quo usque;* or refusal of a valid plea to a subject matter of complaint within the jurisdiction, in which case, although, if the plea had been received, it might have been tried in the Court below, yet, if it be refused, then, upon its validity and truth being established in the Court above, the prohibition is absolute: *White* v. *Steele* (2). In these cases there is entire jurisdiction over the subject matter.

Another class in which the exception must first be taken in the Court below is that in which there is general jurisdiction over the subject matter, but a defence is raised which the Court is incompetent to try, as where in a suit to repair a chancel the impropriator pleads a custom for the parish to repair, or raises a question of parish or no parish, which must be tried by a jury; see *Duke of Rutland* v. *Bagshaw* (3). In such a case the prohibition goes so soon as it appears that the special Court cannot proceed without trying the custom, or taking a step towards trying it, even though it be not yet in issue, or a plea thereof refused: *French* v. *Trask* (4); *Byerley* v. *Windus* (5). And in this class of cases, the prohibition acts simply in aid of the special or inferior Court, by trying what that Court had no jurisdiction to try, and upon an affirmative decision the prohibition is absolute, but upon a negative decision there is a judgment of consultation, upon which the special or inferior Court proceeds with the cause unhampered by the objection.

The *Bishop of Winchester's Case* (6), was of an intermediate class; and it has a peculiarity which has escaped the notice of critics, viz., that it relates to the controversy whether a layman could prescribe or be discharged by a custom in *non decimando*.

(1) Doug. 378.
(2) 12 C. B. (N.S.) 383. s/ [illegible] 1177
(3) 14 Q. B. 869.
(4) 10 East, 348.
(5) 5 B. & C. 1.
(6) 2 Co. Rep. 43a.; Cro. Eliz. 511.

The point of the decision was that spiritual persons could so prescribe, and that in doing so they acquired the right, not only for themselves but also for their tenants, and that the lessees of spiritual persons, though laymen, were discharged by such prescription. And it was farther held, that, as the Court *well knew* (that is to say, had judicial knowledge), that the Judges of the Ecclesiastical Courts would not allow such plea, the traverse of the refusal of the plea was immaterial. It may be that the dictum applying this reasoning beyond the particular case to that of a modus was erroneous, but only upon the ground that the Ecclesiastical Courts would have allowed a plea of modus (though even that dictum has later authority in its favour: *Standford* v. *Neale* (1), but it is more probable that those Courts took to allowing such pleas after the decisions of the Common Law Courts in the Bishop of *Winchester's* and other cases, notwithstanding the fervour with which this was disclaimed, and laid to the score of a "quirk and false suggestion in *Edward* IV. his time made by some serjeants and of some indiscreet ecclesiastical Judge," in the *Articuli Cleri* of 3 Jac. 1., Objections 15 and 16. It is certain that Lord *Coke*, who decided the *Bishop of Winchester's Case*, rested the dictum upon that peculiar ground, namely, that the Ecclesiastical Court would not recognise the right of a lay tenant to take advantage of the exempting prescription of a spiritual landlord, for in the answer to the 15th Objection (2), the Judges, of whom Lord *Coke* was one, speaking of prohibition on the ground of want of jurisdiction to try, state that, in the ordinary case of modus, both "the law and daily practice allow of a traverse of the suggestion." But whatever be the true conclusion upon this, the reasoning is unanswerable, that if it appears judicially to the prohibiting Court that the special or inferior Court will not allow the plea, the prohibition shall go without the idle ceremony of tendering there a plea which is sure to be rejected. This seems to apply *à fortiori* to the present case, in which the Plaintiffs in Error assert a jurisdiction inconsistent with the allowance of the plea.

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It has been suggested that a prohibition is called an action, therefore some wrong in the individual Defendant must be shewn

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(1) 1 Str. 82.

(2) 2 Inst. 609.

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before the action can be maintained. This reasoning is fallacious. The action of prohibition has many peculiarities, and is in effect nothing more than an issue "directed in a disputed case only to inform the conscience of the Court" whether the Court below has power to proceed; both parties are actors, and no damages can be recovered therein, unless the Plaintiff in the inferior Court proceeds after a previous prohibition. (*Buller's Nisi Prius*, 219, recognised in *White* v. *Steele* (1).) It cannot be resorted to, like an ordinary action, as a matter of course, but only by direction of the prohibiting Court, and then not without the concurrence of the Defendant, who may allow the prohibition to go in the first instance without even the expense of shewing cause: see *Pewtress* v. *Harvey* (2). The proceeding in prohibition, therefore, does not stand upon the footing of an action for a wrong. In a prohibition for want of jurisdiction the question is, not whether the party or the Court has done a wilful wrong, but "whether the Court has or has not jurisdiction:" *Ede* v. *Jackson* (3).

8 QB 198

The writ of prohibition at suit of a party is not, as it was thought to be by some eminent Judges at the close of the seventeenth century (see *per Holt*, C.J., *Clay* v. *Snelgrove* (4), and the decision of the same Judge in *Wharton* v. *Pits* (5), overruled in *Velthasen* v. *Ormsby* (6)), in the discretion of the Court. This erroneous opinion may in part account for the fact that the cases reported to have occurred in the seventeenth century and the early part of the eighteenth, under the head of prohibition, are not to be reconciled with one another, or with earlier and later authorities. The law upon this question of discretion is thus stated in the judgment of the Queen's Bench in *Burder* v. *Veley* (7): "If called upon we are bound to issue our writ of prohibition as soon as we are duly informed that any Court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, though there may be a possibility of correcting it by appeal . . . . The question then remains, what are the defects that authorize and require us to issue the writ of prohibition? The answer is, that they are in every case of such a nature as to shew a want of jurisdiction to decide the case before them: *Gardner* v. *Booth* (1). In whatever stage that fact is made manifest to us, either by the Crown or by one of its subjects, we are bound to interpose." The writ, however, although it may be of right, in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the Court, is not a writ of course, like a writ of summons in an ordinary action, but is the subject of a special application to the Court upon affidavit, which application, and the proceedings thereupon, are now regulated by the Act of 1 Will. 4, c. 21. Before that Act the proceedings were commenced by mere suggestion, which, with exceptions that do not include the present case, need not have been verified by affidavit. The proceeding was *qui tam*, and it supposed a contempt in disobeying an imaginary precedent writ of prohibition. To that course of proceeding only were the decisions relied upon, to the effect that the Court will not interfere upon "mere suggestion" before plea applicable. They amount to this, that before plea the Court, in its discretion, would not interfere upon a bare suggestion without an affidavit; and they have become inapplicable since the statute, which substitutes a motion upon affidavits in all cases for a suggestion, for it enacts, that "it shall not be necessary to file a suggestion upon any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be *expressed* to be on behalf of said party only, and not, as heretofore, on behalf of such party and of His Majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the Court below as may be necessary to shew the ground of the application, without alleging the delivery of a writ, or any contempt, and shall conclude by praying that a writ of prohibition may issue, &c."

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(1) 13 C. B. (N. S.) 231, 234. [illegible] 1177

(2) 1 B. & Ad. 154.

(3) Fortesc. 345.

(4) 1 Ld. Raym. 578.

(5) 2 Salk. 548.

(6) 3 T. R. 315.

(7) 12 Ad. & E. 263.

The application for total want of jurisdiction may be made either by the party or a stranger. In the answer of the Judges to the 3rd Objection of the *Articuli Cleri* of 3 Jac. 1, it is laid down that "the King's Courts that may award prohibition being informed, either by the parties themselves or by any stranger, that any Court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same as well after judgment and execution as before." The jurisdiction, therefore, does not, it seems, depend (for in the case of the Crown or a stranger it cannot depend) upon the course of pleading. However, in the latest case in which this subject was considered, *Re Forster* (1), upon motion for a prohibition to the Court of Divorce after sentence, although it was laid down that upon the application of a stranger the interference of the Court is discretionary, yet the right of a party aggrieved was fully recognised. "I entirely concur," said *Cockburn*, C.J., "in the proposition, that although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiæ*, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another Court." Such a discretion, it may be added, once exercised, cannot be the subject of review in a Court of Error, for the proceedings upon the motion do not appear upon the record. In this respect prohibition strongly resembles mandamus, where the Court of Queen's Bench exercises a discretion as to whether the writ shall go; but the writ once granted must be met by a return shewing a legal answer.

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(1) 2 Salk. 548.

The application may be made either against the party, or the Judge to be prohibited, or both, though in old times, when the proceeding to be prohibited was an appeal to *Rome*, it was necessarily against the party only. In modern practice the application in the first instance is made in form against the party and the Court; but it is usually the party, and very rarely the Court, that shews cause against the rule, and pleads to the declaration. In the present case, on the other hand, the Court, asserting and insisting upon its jurisdiction, has taken the defence upon itself, and that defence is inconsistent with its allowing the plea which it is now argued ought to have been pleaded before prohibition. And the precedents shew that there is no difference between the proceed-

(1) 4 B. & S. 187; 10 Jur NS 254, 256

ings against a party and those against the Court, except in the expressions "*sequi placitum*," "*trahere in placitum*," "*multipliciter fatigare*," and the like, for the one, and "*tenere placitum*," for the other. See the numerous writs in the Register, folios 33 to 45 and 98A, and *Bracton*, folios 402 to 413, from which it appears that unless the Plaintiff below had the right of prosecuting the suit in the Court below, prohibition goes to the party and the Court, either or both of them.

It was stated by counsel at the bar that the proceedings in this case in the Mayor's Court allege a debt within the jurisdiction, and thus, that albeit they are untrue, they cannot be prohibited because they are regular upon the face of them. If it be the fact that this debt was alleged in the proceedings below to be within the jurisdiction, as to which the record gives no information, this can make no difference, except that it brings the case more clearly within Lord *Coke's* Comment on the *Statute of Westminster* (previously noticed) as being a false supposal. The rule is, that where want of jurisdiction is apparent upon the proceedings prohibition goes at any time after service of the process, and even before articles, "because it is much better for the party to apply for prohibition in the first stage than after expense is incurred:" *Francis* v. *Steward* (1).

It was insisted, however, that there was some substantial difference between the case of a patent defect of jurisdiction and a latent one, disclosed, as here, by apt averment, and admission or proof. But this notion, as applied to prohibition before judgment, is quite antiquated. It was indeed, so lately as the early part of the sixteenth century, thought by some, that in the case of the Spiritual Courts matters collateral, not appearing upon the proceedings, must be left to the conscience of the Judges without control: Docter and Student (2). This blind confidence was not, however (that we can find), ever extended to lay Judges, and it was not universally reposed even in spiritual ones, for in the *Abbot of St. Albans' Case* in the Year Books (3), the Court of Common Pleas prohibited a suit of defamation asserted by the abbot against a man and his wife, upon a suggestion that the defamation consisted in statements

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(1) 5 Q. B. 984.

(2) Bk. ii. c. lii. p. 301.

(3) T. 22 Ed. IV. 20, pl. 47.

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made in the course of an action brought against the abbot for false imprisonment of the wife, under peculiar circumstances, which did not appear upon the libel, but were suggested by the way of surmise; and, indeed, that prohibition must have issued after sentence, for there was a writ to the ordinary to assoil the wife of an excommunication fulminated against her; the proceedings upon which by attachment against the ordinary are reported: Year Book (1). And in the course of the sixteenth century it was laid down by *Fitzherbert, Natura Brevium* (2), and adopted in the case of a Spiritual Court, first by the Queen's Bench (3), and afterwards by all the Judges in their answer to the 3rd Objection of the *Articuli Cleri,* 3 Jac. 1, and it is now settled law, that prohibition goes not only for a patent defect, but also upon a surmise ("*sur un surmise,*" *Brooke's* Abridgment (4), or suggestion of collateral matter, which now, since 1 Will. 4, must be upon oath. The answer of the Judges to the 11th Objection, *Articuli Cleri,* 3 Jac. 1, was, "It is manifest that though in this libel there appears no matter to grant a prohibition, yet upon a collateral surmise the prohibition is to be granted, as where one is sued in a Spiritual Court for tithes of *sylva cœdua* the party may suggest that they were gross or great trees, and have a prohibition, and yet no such matter appeareth in the libel." And this is indeed manifest, because otherwise the party pursuer might gain an advantage for himself, and put his adversary in a worse position, by suppression or bare falsehood.

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564,

There is, indeed, a distinction after sentence between a patent and a suggested defect, for if the party below, whether Plaintiff or Defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior Court, and is defeated, then, if the defect be of power to try the particular issue only (*defectus triationis,* as it has been called), the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause (*defectus jurisdictionis*), and that defect be apparent upon the proceedings, a prohibition goes after sentence: *Roberts* v. *Humby* (5). If it be not apparent, but the party, instead of moving for a prohibition, pleads in the special or inferior Court the facts ousting the jurisdiction, and such Court improperly decides that it has jurisdiction, he may, notwithstanding such decision, upon satisfying a superior Court that it was erroneous, obtain a prohibition: *Thompson* v. *Ingham* (1), followed in *Chew* v. *Holroyd* (2), and *Marsden* v. *Wardle* (3). Where, however, the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction: *Knowles* v. *Holden* (4); yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant: see *Case of the Admiralty* (5). The objection in such cases is, that the applicant comes too late, not, as here, that he comes too soon; and the cases cited at the bar as to applications after sentence are therefore inapplicable.

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(1) M. 22 Ed. IV. 29, pl. 9.

(2) Page 43; 7th Ed. p. 100.

(3) Hil. 31 Hen. VIII.; Bro. Abr. Prohibition, pl. 17.

(4) *Ubi supra.*

(5) 3 M. & W. 120.

8 QB [illegible]
22 Ch D 329

Indeed, it seems not too much to assert that the question,—at what time a prohibition ought to issue,—is one of practice only, and that there is not necessarily any difference in the form of the writ of prohibition itself, or the declaration thereupon, between the case of want of jurisdiction apparent upon the proceedings in the Court below and want of jurisdiction made known to the Court above by surmise of collateral matter. The declaration in this case, for instance, which appears to be concisely and well drawn, is equally applicable to either alternative; and it is only upon the record that any question can arise in this House. Nothing but prolixity of pleading could ever have raised such a question upon the record, or otherwise than in the first instance upon the motion. No one

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(1) 14 Q. B. 710.
(2) 8 Ex. 249.
(3) 3 E. & B. 695. 1d Jur 578
(4) 22 L. J. (Ex.) 223.
(5) 12 Co. Rep. 77.

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can read the writs of prohibition already referred to, and the form of the record in *Bracton* (1), and the writs in the register *ubi supra* (which furnish good evidence of the law, more especially in the case of so ancient a writ as prohibition), without perceiving that no distinction is made between the two cases, and that in each the question to be tried upon the record is that of jurisdiction only. All the rest is but interlocutory on motion to satisfy the Court that there is occasion for the prohibition, or for allowing the question of competency to be tried. If the application be resisted as unnecessary, or vexatious, or premature, the practice which has prevailed of deciding such matters at once upon the motion seems unquestionably the more convenient one. No case has been cited or found in which it was raised or decided upon the record. And there is abundant authority to shew that even upon motion it is not an objection that ought to prevail, and that the party proceeded against in the inferior Court may, at his option, either plead there or apply for a prohibition.

The form of the prohibition upon the *Statute of Westminster* implies that it may issue before process, and it is stated in 2 *Institute* (2) that it may so issue. It is also there said that the remedy by action for double damages was lost by pleading in the inferior Courts, which was an additional reason for prohibition before plea.

In *Fitzherbert's Natura Brevium* (3), the common law is stated to the same effect in dealing with the case of writs in an inferior Court for a sum beyond its jurisdiction, the demand being split to make it appear to be within the jurisdiction, thus:—"And if a a man do owe unto another man five marks, and he sue several plaints for the same in the County Court, or in any other [such] Court, against the debtor, he shall have a prohibition thereof, and rehearse the matter, &c. . . . And so, if the executor sueth in the County or in the Court Baron for a debt of five marks by divers plaints, whereas the debt is upon contract or upon an obligation, now the Defendant may shew the same, and plead unto the jurisdiction of the Court, or he may have a writ of prohibition directed unto them, that they do surcease, &c. And if he have judgment in any of the plaints sued for parcel of the debt, yet in the prohibition he may prohibit him in the plaints which are depending, and that execution of the judgment cease for the residue." This was followed in *Re Ackroyd* (1).

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(1) Page 409 b.

(2) Page 230.

(3) Page 46; 7th Ed. p. 107.

The same law is laid down in *Comyn's* Digest (2), where, after stating that the Defendant may plead to the jurisdiction of the inferior Court, it is said:—"So upon an *affidavit* of the fact he may have a prohibition without pleading to the jurisdiction." *Per* 2 J. 1, cont. Lut. 1026.

In *Blackstone's* Commentaries (3), where an account of the practice before the statute is given, the "grievance" to be remedied by prohibition is stated to be that of "encroachment of jurisdiction, or calling one *coram non judice* to answer in a Court that has no legal cognizance of the cause;" and no mention is made of its being necessary to plead.

Having thus answered the question upon an examination of the nature of the proceeding, and the earlier and weightier authorities, we must next consider the cases referred to for the Plaintiff in Error, and compare them with the later authorities. Those in the seventeenth century, before Lord *Holt's* time, were not referred to at the bar, doubtless because of their notorious conflict and confusion. The clue to this maze is made up partly of the erroneous notion that prohibition was discretionary, and partly of the erroneous notion that the plea was in abatement, but in great measure of the desire of the Judges to have the good faith of the suggestion in some way verified. Except in cases within the 2 Edw. 6, c. 13, the Applicant, according to the old practice, was not bound to verify the suggestion before declaring in prohibition; and this occasionally led to false surmises for delay, which were much complained of: see as to the Admiralty (4). In the reign of *Elizabeth*, in *Wiggen* v. *Arscot* (5), *Gawdy* prayed the prohibition upon a surmise good and sufficient, which he insisted was enough, and according to the practice; but *Clench*, J., answered:—"It hath not been used to the contrary; yet because great inconvenience may ensue upon the admitting of it, the Court *hath taken order* that no prohibition shall be granted upon such a surmise without great probability of the truth of the surmise." This language indicates a change in the practice, not the substance of the law.

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(1) 1 Ex. 479.

(2) "Courts," P. 15.

(3). Vol. iii. p. 111. 3 Stephen
696 3rd Edn

(4) Godol. Adm. Jur. 76; Laws of the Sea, 221.

(5) 1 Leon. 213.

As a sample of the cases which intervene between that and Lord *Holt's* time (a period embracing the reigns of *James* I., *Charles* I., *Charles* II., and *James* II.), such as might be cited in favour of prohibiting, reference may be made to *Palmer* v. *Pope* (1); *Anfild* v. *Feverill* (2); *Hildebrand's Case* (3); *Godfrey's Case* (4); *Bushel* v. *Jay* (5); *Green* v. *Coldway* (upon suggestion without plea) (6); *Wainman* v. *Smith* (before declaration) (7); and *Turner* v. *Weston* (affidavit without plea) (8). Upon the other side an equal number might be cited, including the singular anonymous case in *Skinner* (9), where the Judges refused to interfere because they did not *believe* that the Spiritual Court would refuse a plea of *son assault demesne* to a libel for assaulting a clerk.

A recital of these cases may well be spared, for it is certain that in Lord *Holt's* time it became the practice not to interfere upon a "*bare* suggestion" without plea; and the cases cited do not prove any more. In order to make this clear it is proper now to discuss, in order of date, the four cases not already disposed of.

In *Cook* v. *Licence* (10), a prohibition was moved for to the Sheriff's Court in *Bristol*, upon suggestion on the part of the Defendant that causes of action arising out of the jurisdiction of the Sheriff's Court ought not to be sued there. It is left to inference whether the prohibition was granted or refused. It may be inferred that it was refused, upon the ground that the Defendant cannot pray a prohibition upon suggestion of a matter which he could not plead. In the course of the argument, *Holt*, C.J., said:—"A man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the Court, the garnishee may plead it." And he referred to *Clarke* v. *Andrews* (11), where a debt due from the garnishee arose out of the jurisdiction, and it was held attachable, because it was "debt upon simple contract, which follows the person of the debtor." This case may be sustained upon the ground that there was a bare suggestion, and no affidavit. The reason given that the Defendant had not appeared, is contrary to the *Statute of Westminster* 1, and to the earlier and later decisions.

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(1) Hob. 79a.

(2) 1 Roll. 61.

(3) Ibid. 285.

(4) Latch. 11.

(5) 1 Keb. 153.

(6) Ibid. 786.

(7) Siderfin, 464.

(8) 2 Lutw. 1020.

(9) Page 20.

(10) 1 Ld. Raym. 346.

(11) 1 Show. 9 (where it is expressly stated "that we had pleaded this matter there, and the plea was refused, and we had affidavit thereof."

Anonymous (1) was, it may be collected, an application for a prohibition to the Spiritual Court of a suit for tithes on the ground of a *modus*, which had not been pleaded in the Court below, where it was said that the *Bishop of Winchester's Case* "seems not to be law; and the Court refused the prohibition, because 'perhaps they might admit the plea,' in which case, the defect being only of jurisdiction to try, the Court having jurisdiction over the cause might proceed." And the report proceeds :—"Also in 10 Will. 3, *Banco Regis*, it was said by *Holt*, C.J., "that if a modus be pleaded in the Spiritual Court and admitted, no prohibition shall go; but if the question be, whether a modus or no modus, a prohibition shall go; and so is the law, viz. wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below before you can have a prohibition, otherwise when the cause of prohibition appears upon the face of the libel." This decision is substantially right as applied to cases where there is jurisdiction over the cause, and only a defect in power to try a particular issue, as already explained. It is clear, however, that even in that case there need be no formal plea, and the decision does not touch the matter in hand.

In *Dike* v. *Brown* (2) the libel in the Spiritual Court was for tithes of faggots made of loppings of trees, and the suggestion for prohibition after sentence was, that the loppings were of timber trees over twenty years old, and not titheable, which had not been set up in the Court below. And *Holt*, C.J., said, "The sentence will not hinder the having a prohibition in any case but in case of prohibition grounded upon 23 Hen. 8, c. 9, for citing out of the diocess; but, because the Plaintiff had not pleaded this matter in the Spiritual Court, they denied the prohibition, because the Spiritual Court has general jurisdiction of tithes, and if any special matter deprives them of their jurisdiction, it must be pleaded there. And if it had been pleaded there, and issue found upon it, and upon the trial it had been found not to be *sylva cædua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted." So that the application was after sentence, and upon suggestion only, and therefore the decision was right, but inapplicable.

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(1) 2 Salk. 551. (2) 2 Ld. Raym. 835.

The only other case relied on at the bar was the *Anonymous Case* (1), in which, as in *Cook* v. *Licence* (2), a motion for a prohibition upon a suggestion only that the cause of action arose out of the jurisdiction of the inferior Court was refused, the Court saying that no prohibition ought to go upon a *suggestion*, but that the Defendant "ought to plead to the jurisdiction, and if they refused such plea, then move for a prohibition." So far the case was right, because there was no affidavit; but *Holt*, C.J., went on to say, "there have been cases to the contrary, but the law is now settled otherwise, and if a person plead in chief, he shall never assign this for error, if such inferior Court have jurisdiction of the thing." This latter dictum was only a repetition of the common mistake as to a plea to the jurisdiction in an inferior Court being in abatement, a mistake already explained in detail.

After this inspection of the supposed authorities against the prohibition, ending with the 6th *Anne*, it is only necessary to cite one case in Lord *Mansfield's* time, where the subject was fully considered, and the practice, so far as the Common Law Courts are concerned, established that either affidavit or plea will suffice.

In *Buggin* v. *Bennett* (3), upon an application for prohibition to the Admiralty Court after sentence, because of its entertaining a suit upon a deed under seal made on land, it appeared that the proceedings in the Admiralty Court did not aver, nor did the Defendant set up in that Court, the matter which took away the jurisdiction, and there being only a suggestion without affidavit, Lord *Mansfield*, in the course of his judgment, said, "If it appears upon the face of the proceedings that the Court has no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because it is a nullity; it is *coram non judice*.

(1) 11 Mod. 132.
(2) 1 Ld. Raym. 346.
(3) 4 Burr. 2035.

But when it does not appear upon the face of the proceedings, if the Defendant below will lie by or suffer that Court to go on, under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party, who, when Defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither *after sentence* against him there, and *suggest* that collateral matter as a cause of prohibition, and obtain a prohibition upon it after all this acquiescence in the jurisdiction of the Court below." It is all put upon acquiescence, and coming too late, and by suggestion only; not, as here, upon coming too early. The final decision in *Buggin* v. *Bennett* was, that the prohibition should be refused, because there was only a *suggestion*, and no affidavit. Mr. Justice *Yates*, like Lord *Mansfield*, put it upon the ground that a suggestion of collateral matter not appearing upon the libel, nor pleaded in the Court below, must be verified by affidavit. Mr. Justice *Aston* agreed, but added, that "even before sentence it would not be *decent* to grant a prohibition when no such plea had been tendered to them, much less after sentence." The other Judges, however, expressed no such opinion as to an application before sentence; and Mr. Justice *Hewitt* (afterwards Lord *Lifford*), on the contrary, said, "it is reasonable to move before sentence for a prohibition upon affidavit of the truth of the suggestion, when the fact suggested is not pleaded. And that was the case of *Howe* v. *Napper*. But here they have acquiesced till after sentence."

Afterwards, and probably in consequence of this difference of opinion between Justices *Aston* and *Hewitt* upon the collateral point, Mr. Justice *Aston* appears to have looked into the precedents, which turned out to be in accordance with the views of Mr. Justice *Hewitt* (1). Thus in *Driver* v. *Driver* (2), upon motion for prohibition to the Consistory Court to stay a writ for calling a woman whore in *London*, where by the custom that is actionable, the Court held that the custom must be *either* verified by affidavit *or* pleaded. And the same was laid down in *Hinds* v. *Thomson* (3), where *Godfrey* v. *Llewellyn* (4), and the *Anonymous Case* (5), were

(1) 4 Burr. 2040, n.
(2) Andr. 304.
(3) Andr. 299.
(4) 2 Salk. 549.
(5) 2 Salk. 551.

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cited, and Chief Justice *Lee*, with the opinion of Chief Justice *Holt* (so much relied upon by the Plaintiffs in Error) before him, that "wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below before you can have a prohibition, otherwise when the cause of prohibition appears upon the face of the libel," held, in terms, that there must *either* be a plea *or* an affidavit; and the distinction was pointed out, that there is no necessity to plead before applying for a prohibition where (as here) if the matter pleaded be true, the Court cannot go on, but only in such cases already observed upon, where the defect is only in the power of trying the particular issue, such as that of a modus, where, if the plea is admitted, the Court may go on, because it has jurisdiction to decide the cause, though not to try the modus.

And the Court of King's Bench, after examining the cases, and the view relied upon for the Plaintiff in Error, laid down the general rule (1), that an objection to the jurisdiction over the subject matter must "*either* be pleaded below, *or* verified by affidavit." And this rule was recognised by Lord *Mansfield* in *Caton* v. *Burton* (2), where he said, "the reason of those cases is decisive, and that "the party shall not stop the proceedings of a Court of justice upon a mere suggestion without an affidavit." Upon this rule, so far as we can ascertain, rested the practice up to the passing of 1 Will. 4, c. 21, since which there must always be an affidavit.

It may not be improper to remark, that as the above general rule was laid down in 1767, and the first edition of *Comyn's* Digest to the same effect was published in 1776, and as no decision has been suggested to the contrary later than the time of Queen *Anne*, the question might, since the statute of 1 Will. 4, have hoped to rest in peace.

Such was the state of the common law and practice. It is right, however, to notice that the practice in Chancery fluctuated so late as the year 1802, when in a case not referred to upon the argument (*Iveson* v. *Harris* (3)), Lord *Eldon* (treating the matter as one of practice not affecting the validity of the writ except upon motion to supersede), doubted the propriety of the then practice (adopted possibly in analogy to the rule laid down in Lord *Mansfield's* time), whereby the writ of prohibition was issued by the cursitor without any application in Court, upon an affidavit that the cause of action arose out of the jurisdiction. His Lordship's attention, however, was not called to the common law cases (except the misleading one of *Sparks* v. *Wood* (1)), either as to the character of the plea, or the time or mode of applying for the writ, but only to certain cases in which application was made *after verdict* (2), and which therefore, as has been shewn, stood upon a distinct ground. Lord *Eldon's* doubts do not appear to have been acted upon either in that or any other case that can be found. And although the Court of Chancery is still occasionally resorted to for prohibition in the vacation, *Field* v. *Lonsdale* (3), yet as the *Petty Bag Act* (12 & 13 Vict. c. 109, s. 48) has given the control of the writ when issued to the Courts of common law, it is submitted that the practice of the latter ought to prevail. This, however, being matter of practice, is for those Courts themselves, and cannot affect the question of substantive law upon the record with which we can only deal in advising this House.

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(1) 4 Burr. 2040. (2) Cowp. 330. (3) 7 Ves. 251.

As to the practice since the statute 1 Will. 4, c. 21, it has been uniform to the effect that prohibition may go in the first instance without the question of jurisdiction being raised by any proceeding in the Court below, or even after a plea therein giving the go-by to that question. It was so decided by Justice *Wightman*, in the case of a prohibition to the County Court: *Sewell* v. *Jones* (4); and such has been the constant practice in like cases.

In *Wadsworth* v. *The Queen of Spain* (5), already cited, prohibition was issued upon the motion of the garnishee, although the Royal Defendant had not surrendered, or put in bail, or in any way taken notice of the suit; and although the garnishee had pleaded *nil habet*, which, according to *Lucking* v. *Denning*, *Sparks* v. *Wood*, and other cases of the like kidney, was a submission to the jurisdiction, and a waiver of all objection. In that case it was admitted that the garnishee might have moved before plea (6);

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(1) 6 Mod. 146.
(2) 7 Ves. 258, n. (25).
(3) 13 Beav. 81. and see Re Forster 3 Jur. N.S. 1238. 24 Beav. 428
(4) 1 L. M. & P. 525.
(5) 17 Q. B. 171.
(6) Ibid. 188.

and the argument was, that pleading admitted the jurisdiction. So various have been the efforts to enforce the alleged jurisdiction, and to exclude any test of its validity.

In *Haber* v. *The Queen of Portugal* (1), already cited, prohibition was granted upon the application of the Queen, although she had not surrendered, or put in bail, or otherwise taken notice of the proceedings than by applying to prohibit them.

It must be assumed that the Legislature was aware of these excesses under the guise of custom, and of the decisions that checked them, before the passing of the local Act; and it would surely be disrespectful to conclude, without express words in the Act, that it was meant to facilitate like proceedings for the future.

For these reasons it is concluded that the plea was not a sufficient answer to the declaration, and that the garnishees in the Lord Mayor's Court could maintain an action for a prohibition without having pleaded in the Lord Mayor's Court, and thus both the questions propounded to the Judges are answered.

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LORD CRANWORTH:—

My Lords, the question in this case arises in an action in prohibition brought by the Defendants in Error against the Plaintiffs in Error in the Court of Exchequer. The facts are as follows:—[His Lordship stated them and the pleadings very fully.]

The pleadings are somewhat complicated, but the substantial question, as your Lordships will have observed, is this, whether or not a custom, alleged to exist in the City of *London*, can be good, which purports to authorize the Plaintiffs in Error to attach in the hands of any person who may happen to be found in the City of *London* money due from him to some other person, till that other person shall come into Court and litigate the case. First of all, the Court of Exchequer, in which the action was brought, and afterwards the Court of Exchequer Chamber, as I have already stated, decided against the validity of such a custom. The Court of Exchequer decided for the Defendants in Error, upon the ground that the custom was invalid. The Court of Exchequer Chamber decided principally, if not entirely, upon another point which was set up by the Plaintiffs in Error, namely, that the writ of prohibition could not issue till the persons claiming the prohibition had pleaded to the cause itself in the Court of the Mayor and Aldermen, till the pleadings had gone to an extent to which they had not gone in the record actually before the Court.

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(1) 17 Q. B. 188.

With regard to the second point, the argument is, that the Defendants in Error ought first to have pleaded in the Lord Mayor's Court the facts which were insisted on as shewing want of jurisdiction, &c., that no one of the parties was a citizen of or resident in *London*, and that neither the debt sued for by *Buckmaster & Co.* against *Farquharson*, nor the debt alleged to be due from *Cox & Co.* to *Farquharson*, arose within the *City*. If on such a plea pleaded by the Defendants in Error, and issue taken upon it, the facts had been found for *Cox & Co.*, the garnishees, the Lord Mayor's Court, it was said, might have admitted its validity, and so no prohibition would have been necessary; and it was argued, on various old authorities, that no prohibition ought to issue until the party asking for it has first pleaded the facts on which he relies as affording grounds for prohibition, and the Court below still continues its proceedings, although these facts have been established in favour of the Defendants who had pleaded them.

But this is not stating the law or practice correctly. Where an inferior Court is proceeding in a cause which arises on a subject over which it has jurisdiction, no prohibition can be awarded till the party sued in the inferior Court sets up a defence on some ground raising an issue which the inferior Court is incompetent to try. Until that is done, no ground for a prohibition has been shewn. But here, assuming that the *City* Court has no jurisdiction to proceed by foreign attachment in a case where no one of the parties is a citizen or a resident in the *City*, and where neither the debt sued for, nor the debt alleged to be due from the garnishees to the Defendants, arose within the *City*, an absolute want of jurisdiction appears on the face of the declaration; and, therefore, unless the Defendants deny and put in issue the facts alleged by the Plaintiffs, it is apparent on the record that the *City* Court never had jurisdiction, and so the case is ripe for decision without waiting for any farther pleading.

The question, therefore, is reduced to that arising on the plea of the Plaintiffs in Error, namely, the validity of the custom insisted on.

My Lords, on that subject I concur in the unanimous opinion of the learned Judges who assisted us at the argument, affirming, as it did, the unanimous judgment as well of the Court of Exchequer as of the Court of Exchequer Chamber. Indeed, I agree in the short but clear judgment pronounced in the Court of Exchequer by the late Lord Chief Baron *Pollock*, in which he observes that it is unnecessary to do more than to state the alleged custom in order to shew its invalidity. It is certain that in the action brought by *Buckmaster & Co.*, *Farquharson*, by appearing, would have had a perfect defence, independent of the merits, for he would have shewn that the cause of action was one of which the Lord Mayor's Court could not take cognizance by reason of its having arisen beyond the limits of its jurisdiction. If, then, the Court would have had no jurisdiction over the Defendant if he had been present, a custom which purports to give it jurisdiction if he is absent, and may never have heard of the existence of a suit against him, is so unreasonable as to be clearly void. That is substantially what is insisted on by the Appellants. This power of proceeding by what is called foreign attachment can obviously be supported as a good custom only when it is exercised in aid of a Plaintiff seeking justice in a case over which the Court has jurisdiction.

The learned Judges who assisted your Lordships when this case was argued, have given their opinions through Mr. Justice *Willes*; and they have investigated the whole subject matter of this case, on both points, with a care and attention rarely equalled. It was pressed for the Plaintiffs in Error, that the Courts of the City of *London* are not to be classed among ordinary local Courts; that they to some extent partake of the quality of the superior Courts; and so that the principle of law which establishes that nothing shall be intended to be within the jurisdiction of a local Court but that which is expressly so alleged, does not apply to the Court now in question. On this point, however, the very able opinion to which I have referred is to my mind quite satisfactory. It is unnecessary to do more than refer to it. The passages cited from Lord *Coke's* Commentary, in the Second Institute, on the *Statute of Gloucester*, shew clearly that he considered the Courts in the

City of *London* to stand in their relation to the superior Courts in the same position as the Courts of other cities. Thus, at page 325, he says: "If, in an action ancestral, the tenant plead bastardy in the demandant, neither the Court in *London*, or any like inferior Court, can award a writ to the bishop for trial thereof, for *nullus alius præter regem possit Episcopo demandare inquisitionem faciendam.*" And then, a little lower down, he says: "and, therefore, if such pleas be pleaded in *London*, or such other inferior Courts, the record shall be removed;" evidently treating the Courts in *London* as inferior Courts: and there is abundance of modern authority to the same effect.

This opinion of the learned Judges so completely exhausts the whole subject, that I do not feel called on to do more than to express my ready concurrence, not only in the result at which they have arrived, but also in the reasoning which has led them to their conclusions; and I therefore move your Lordships to give judgment for the Defendants in Error.

LORD WESTBURY:—

My Lords, I am entirely satisfied with the opinion of the learned Judges, and the elaborate reasoning therein contained. It is unnecessary to attempt to add to that. I have long felt, certainly for the last twenty years, that attempts have been made silently to extend the jurisdiction of the City of *London* Court beyond its proper and just limits. There is no pretence for doing so, nor is there any pretence for saying that this municipal Court of the City of *London* is not a local and inferior Court subject to the jurisdiction of the superior Courts of this realm. My Lords, I am happy to say that this judgment will have the effect of reducing its jurisdiction within its proper and just bounds.

Judgment for Defendants in Error.

Lords' Journals, 30th July, 1867.

Attorney for the Plaintiffs in Error: *T. J. Nelson.*

Attorneys for the Defendants in Error: *Fladgate, Clarke, & Finch.*

1866
June 25, 26.
1867
May 8;
July 16.

STEFANOS XENOS AND ANOTHER . . . . APPELLANTS;

AND

FRANCIS D. WICKHAM . . . . RESPONDENT.

Insurance—Broker—"Signed, sealed, and delivered"—Retaining possession of Deed.

8 Eq 371
7 QB 306-9
8 Ex 50-2
56-7 40
21 Ch D 761
[illegible] Cas
875.

A policy of insurance purported to be "signed, sealed, and delivered" by two of the directors of an insurance company in the presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company. This statement was taken, as against the company, to be conclusive that it was not only duly signed and sealed, but also duly delivered.

A policy "signed, sealed, and delivered," is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it.

It is not necessary that the assured should formally accept or take away a policy in order to make the delivery complete.

After the broker had prepared a slip, and the proposed insurer had accepted it, and had prepared a policy in accordance with it, a desire was expressed by him, and assented to by the underwriter, that the policy should be cancelled, on which a cancellation was in form effected:—

Held, that this was not effectual as to the assured, who had not, in fact, given the broker any authority to cancel the policy.

Per LORD CRANWORTH:—It is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into.

A., a broker, was instructed to effect for *B.*, a shipowner, an insurance on a ship. *A.* gave a slip to *C.* (the authorized representative of an insurance company), which was accepted, and a policy prepared accordingly. When the policy (with the account debiting *A.* with the premium) was sent to *A.*'s office, "duly signed, sealed, and delivered," his clerk said there had been a mistake, that the policy ought not to have gone forward, and that there was no premium due. This was repeated by another clerk of *A.*, who came to *C.*'s office for that purpose, and requested the cancellation of the policy. *C.* acted on these representations (which, however, had been made by *A.*'s clerks without any authority from *B.*, the shipowner), and cancelled the policy, but charged *A.* with the stamp duty paid, and gave the policy to *A.* to enable him, if possible, to get a return of the stamp duty on it. The ship was lost, and *B.* made his claim for the loss:—

Held, that the circumstances were sufficient to shew an execution and delivery of the policy, and that the unauthorized act of *A.* afforded no answer to the claim.

THIS was an appeal against a decision of the Court of Exchequer Chamber (1), which (*diss.* Mr. Justice *Blackburn* and Mr. Justice

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(1) 13 C. B. (N.S.) 435. 10 Jur NS 339

Mellor) had affirmed a decision of the Court of Common Pleas (1), in an action between these parties on a time policy on a ship.

The Appellants are shipowners, carrying on business under the name of the *Greek and Oriental Steam Navigation Company*, and as such were the owners of the ship *Leonidas*. The Respondent is the chairman and representative of the *Victoria Fire and Marine Insurance Company*. The declaration alleged, in the usual form, that the Plaintiffs caused their vessel to be insured by this company for the space of twelve months, from the 25th of April, 1861, to the 24th of April, 1862, on a policy valued at £1000, upon a ship valued at £13,000, and the loss was alleged to have occurred by perils of the sea. There was also a count in trover for the policy.

The Defendant pleaded several pleas, some of which alone are material. The first denied the insurance as alleged; the fourth stated that after the making of the policy the same remained, with the Plaintiffs' consent, in the hands of the Defendant, and whilst it so remained, and before the loss, the Plaintiffs requested the Defendant, for the purpose of putting an end to the policy, to cancel the same and make a return to the Plaintiffs of the premium; that, in compliance with such request, and before the loss, the Defendant did cancel the policy, and thereby put an end to the risk, &c. To the count in trover the Defendant pleaded not guilty, and not possessed.

Issue was taken on all these pleas, and the cause was tried before Lord Chief Justice *Erle*, when it appeared that on the 25th of April, 1861, the Plaintiffs employed Mr. *Lascaridi*, an insurance broker, to effect for them a policy on the ship *Leonidas* for £2000, at £8 8*s*. per cent., from the 25th of April to the 25th of October. In the case of private underwriters at *Lloyd's*, it is customary to have only one slip, which is signed by the different underwriters for the amounts for which they are willing to undertake the insurance. In the case of insurance companies a separate slip is prepared by the brokers of the assured for each company, and the policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker.

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(1) 13 C. B. (N.S.) 381. 9 Jur NS 471

In accordance with the usual practice, *Lascaridi* prepared for the Respondent's company a slip embodying the terms of the proposed insurance, and got it initialed by Mr. *E. J. Sprange*, a clerk of the company, for the sum of £2000. This was left at the office of the company in order that the policy might be made out. Before the policy was made out, the Plaintiffs sent to *Lascaridi* a letter, dated 29th of April, 1861, desiring him to "cancel *Leonidas* insurance, and insure the same for all the year and for all seas at £10 10*s.* per cent." On the 30th of April *Lascaridi* called at the Respondent's office, and stated that he did not wish the policy already mentioned to proceed, but desired to effect another. The slip for the insurance for £2000 for six months was then destroyed, and another slip was prepared by him, and initialed by the Respondent's clerk, "*E. J. S.*," on the *Leonidas* for £1000 for twelve months, from the 25th of April, 1861, on "hull, stores, and machinery, valued at £13,000." On the 1st of May *Lascaridi* sent to the Plaintiffs an account debiting them with the sum of £338, as payable by them in respect of insurances on the *Leonidas*, and drew on them, as of that date, for that sum at three months. They accepted the bill, and when they did so *Lascaridi* told them that the policy would be ready in a day or two. This bill was paid at maturity. In the course of a few days afterwards a policy in the usual form of the company was filled up from the slip, and was dated the 1st of May, 1861.

The custom, as between insurance companies and insurance brokers, is for the companies to give credit to the brokers for the premiums, debiting them in account with the amount of such premiums, and when insurances are effected (as this was) for cash, or on cash account, all premiums for insurances effected during each month are payable on the 8th of the succeeding month. Just before the expiration of this credit a debit note is sent to the broker, with a statement of the amount of the premiums due, less a discount and a brokerage at 15 per cent. On the 8th of June a debit note was sent from the Respondent's office to that of *Lascaridi*. On its being presented, *Lascaridi's* clerk said that no premium was due, and, upon a second messenger being sent with the policy, which was expressed to be duly "signed, sealed, and delivered," and the debit note, the clerk repeated the statement, and said that the policy ought not to have gone forward. In the course of the day one of the clerks of *Lascaridi* called at the office of the company, and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was thereupon indorsed on the policy in these terms: "Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto." This memorandum was signed by two directors, witnessed, and registered in the regular way. The debit against *Lascaridi* for the premium was cancelled, but he was charged with the stamp, and the policy was handed to his clerk, with the memorandum of cancellation thereon, that he might, if he could, obtain from the stamp office a return of the stamp duty. On the morning of the 2nd of September, 1861, *Lascaridi's* clerk called at the office of the company with the policy, said that the cancellation had been made by mistake, and wished the policy to be reinstated. He was informed that if the ship was safe, and not in the *Baltic*, there would be no objection, and he was requested to call again for an answer. At twenty minutes past eight o'clock on the morning of that day intelligence, by telegram, had been received at *Lloyd's*, stating that the *Leonidas* was stranded on the *Nervo*, but this intelligence was not known to the Respondent till three o'clock in the afternoon of that day. The reinstatement of the policy was then refused. It was admitted that the Appellants had not, in fact, authorized the cancellation of the policy, nor did they ever receive back from *Lascaridi* any part of the premium, or any credit for the same.

The Lord Chief Justice, on these facts, directed a verdict for the Defendant, but reserved leave to the Plaintiffs to move to enter a verdict for them if the Court should be of opinion that the policy was binding on the company, and had been cancelled without authority. A rule to that effect having been obtained, it was, after argument, discharged, and this decision was confirmed on appeal to the Exchequer Chamber. The present appeal was then brought.

The Judges were summoned, and Lord Chief Baron *Pollock*, Mr. Justice *Willes*, Mr. Justice *Blackburn*, Mr. Justice *Mellor*, Mr. Baron *Pigott*, and Mr. Justice *Smith*, attended.

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Sir *George Honyman*, Q.C., and Mr. *Watkin Williams*, for the Appellants:—

The judgment in the Court below was, that there never was a complete and binding contract between these parties. That proposition cannot be sustained. The policy was treated, except by Lord Chief Baron *Pollock*, as a common law deed, and it was supposed to require actual delivery to make it effectual. Formal delivery to the Appellants, or even to a particular person on their behalf, is not essential for its validity: *Comyn's* Digest (1); *Rolle's* Abridgment (2). In *Exton* v. *Scott* (3), the grantor of a mortgage for years retained the deed in his own possession, and it was only discovered among his papers after his death, yet it was held not to be an escrow, but a deed, and took effect from its execution, and was good against his creditors. In *Hall* v. *Palmer* (4), a bond executed for the benefit of a woman with whom the grantor had cohabited, though retained in the hands of the testator's solicitor, and quite unknown to her till his death, was declared by Vice-Chancellor *Wigram* to be valid for her benefit. So in *Fletcher* v. *Fletcher* (5), where a man had executed a deed in favour of his illegitimate son, though unknown to the son, and the deed was kept in the grantor's possession, and not discovered until after his death, it was held to entitle the son to sue his estate for the amount. *Doe* d. *Richards* v. *Lewis* (6) is to the same effect; and in *Kidner* v. *Keith* (7), a deed which, by arrangement, was to be executed in duplicate, was executed by the grantee, but not attested, and was sent in that state to the solicitor of the grantors to procure their execution, and they accordingly signed and delivered it; this was held to be sufficient, and the whole estate passed, the arrangement not rendering the deed a mere escrow till the duplicates should have been interchanged. In the case of a corporation, the act of putting the common seal to the deed is equivalent to the delivery. The policy here was treated by the parties themselves as having been duly delivered. It professes to have been "signed, sealed, and delivered" in the presence of the resident secretary, by two directors of the company, who declare themselves to have acted in accordance with the provisions of the deed of settlement of the company. Nothing more was required to make it a perfect and binding instrument. The retention of the policy by the officer of the insuring company, after it had been fully executed, would not prevent it from being complete. *Doe* d. *Garnons* v. *Knight* (1) is not distinguishable from the present. That case established that the execution of the deed and the formal act of delivery, by putting the hand on the seal, and saying, "I deliver this as my act and deed," made it binding as such, although the grantor, in fact, retained it in his custody, and did not deliver it to the party who was to take, or to any one for his use.

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(1) Fait. A. 2.
(2) Fait. J. 1.
(3) 6 Sim. 31.
(4) 13 L. J. (N. S.) Ch. 352.
(5) 14 Ibid. 66.
(6) 11 C. B. 1035.
(7) 15 C. B. (N. S.) 35.

As to the liability of the broker, it is clear that if he makes himself liable for the premiums, money had and received can be maintained on the policy, although in fact the premiums have not been paid at the time of the loss: *Power* v. *Butcher* (2); *Arnould* on Marine Insurance (3). If otherwise, it would follow that, should the ship be lost between the day of the execution of the policy and that for the payment of the premium, there would be no insurance, a proposition which could never be admitted.

The formal handing over of the policy of insurance is not necessary, for a policy is not like a bill of exchange, which may be revoked at any time before it is delivered; besides which, as Lord *Campbell* observed in *Humfrey* v. *Dale* (4), these matters must be looked at not solely according to the habits of lawyers, but with reference also to the usages and concerns of trade. Here all was done according to those usages, and it cannot be necessary to the validity of a policy of insurance that it should be obtained by the assured the moment the slip is signed. As soon as the slip was signed here the contract was complete, and the slip was in truth an agreement between the Plaintiffs and the Respondent, and not between the broker and the Respondent.

Then, as to the question whether, if the policy was completed, the broker had not, so far as the Respondent was concerned, authority to cancel it, and whether he had actually cancelled it. The Plaintiffs had never authorized the cancellation; that was

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(1) 5 B. & C. 671.

(2) 10 B. & C. 329.

(3) Vol. i. p. 105.

(4) 7 E. & B. 278. 3 Jur NS 213, 215

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admitted in the special case. The clerk had no right, without their authority, to cancel it. *Lascaridi* had never given him any authority to do so; and *Lascaridi* himself not having received authority from the Plaintiffs to cancel the policy, possessed no power to give him any. The person who is authorized to effect a policy does not thereby acquire authority to cancel it. The case states that the course with insurance companies is for the broker to prepare for each a slip, and the policy is afterwards filled up from that slip by the officers of the company, and is kept by the company until sent for by the assured or his broker. That very usage assumes that the policy may continue with the insuring company, but yet the contract will be complete. The mere keeping possession of the policy, even if it had still remained in the possession of the company, which it did not, would, therefore, have amounted to nothing; but, in fact, the actual possession remained with the broker, who must be treated as having held it as the agent of his principals. The general authority of a broker is stated in *Story* on Agency (1), where it is shewn (2), that though the broker, if the policy remains in his hands, may have, incidentally, authority to receive payment on a loss, he will not have authority to receive payment except in money. It is clear therefore, that his authority is restricted in its nature. The policy here was completely effected, and what was afterwards done was null and void. The contract was complete when the slip was signed. The Respondent thereby undertook the risk. [Lord Cranworth:—If the Respondent had agreed to execute a policy, but had not executed it, could there have been an action for not doing so?] There might have been but for the stamp laws; they would prevent the remedy on such a contract, for the slip is not stamped, and so there would not have been sufficient legal evidence of it. [Lord Cranworth:—Was there not here a cancellation indorsed on the policy before there was anything which amounted to a delivery of it by the parties to be made liable on it?] That depends on the view which the House may take of the facts of the case, and of their legal effect. The Plaintiffs submit that there was here a complete delivery—that everything was really completed on the 1st of May, there were no terms to be considered, or added, or rejected, the execution of the policy and its delivery were perfect, and there had been nothing since which could impeach the validity of the contract: *Ridgway* v. *Wharton* (1), where *Fowle* v. *Freeman* (2) was adopted.

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(1) S. 58. (2) S. 103, 109.

Mr. *Bovill*, Q.C., and Mr. *Archibald*, for the Defendant:—

There was no policy here under the hands and seals of the company at the time of the loss. The declaration alleged the existence of a policy of insurance, purporting thereby to bind the company to certain things. There was nothing to sustain that allegation. Payment of the premiums was to be made by the Plaintiffs through their agent, *Lascaridi*. The bill to make that payment was drawn in May, it had four months to run, and the date at which it was to become payable was actually subsequent to the date at which the ship was lost, and was long subsequent to the time at which the policy had been repudiated. The Respondent never received any payment—the broker was, indeed, at one time debited to him in the books of the company, but that was nothing without the broker's assent; and so far from giving that assent, he denied all liability to pay the premium, and stated that the policy ought not to have gone forward. That occurred on the 8th of June; and as the underwriter always looks to the broker, the policy then came to an end. A memorandum of cancellation was made on the policy, and though the policy was left with the broker, it was left not as a delivery of it, as a policy, to him, as the broker for the assured, but merely to enable him to get a return of the stamp duty. This, so far from being an acknowledgment of liability, was a distinct declaration that no liability existed. The broker was the avowed agent of the Plaintiffs, and they were bound by his acts. Nothing farther occurred till the vessel was lost. The Defendant's company was not a corporation, but even if it had been, that would not have made the affixing of the seal to the policy binding on the company, unless that act had been done with a distinct intent to that effect: *The Derby Canal Company* v. *Wilmot* (3). Nothing was done here which would bring the case within *Doe* d. *Garnons* v. *Knight* (4),

(1) 6 H. L. C. 238; 4 Jur NS 173
(2) 9 Ves. 351.
(3) 9 East, 360.
(4) 5 B. & C. 671.

where there had been a formal affixing of the seal, and a formal delivery of the document as the deed of the party. As to the delivery of a deed, it is said in the Touchstone (1):—"The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed." Here it was only proposed to be delivered, and on that proposal it was repudiated. In truth, it never was delivered, and has never been in the possession of the Appellants as a deed accepted by them. That acceptance was necessary to make it binding on the insurers, for the Appellants were at liberty, up to the last moment, to object to the terms of the deed and to repudiate it. In *Thompson* v. *Leach* (2), three out of four Judges were of opinion, against *Ventris*, that where there had been a surrender, though formally executed by some parties, if not agreed to by the surrenderee it did not operate as to him. *Viner* (3) is to the same effect; and in *Townson* v. *Tickell* (4) a devisee in fee was allowed to disclaim by deed without matter of record. Here the policy was never intended to be absolute till accepted by the other party, and by him it was repudiated and rejected.

The writing of the terms on the slip was not all that was necessary to constitute the contract. The premium was to be paid, and the policy was to be accepted. Neither of these things was done. Under such circumstances, the analogy to a bill of exchange is good, and the consideration not being paid, and the instrument not being delivered, no liability can possibly arise upon it. So in the case of an arbitration. The appointment of an arbitrator is not all that is necessary to bind the parties. It cannot, therefore, be argued that the signing and sealing of the policy rendered the policy completely binding on all parties. The acceptance of it would have made it binding—that acceptance was refused. The terms of the proposed contract were not adopted by the Appellants, and they, not having accepted it, cannot now claim the advantage of it.

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(1) Ch. 4, p. 58.

(2) 2 Ventr. 198. This judgment was affirmed in the King's Bench, 3 Mod. 296, but is said (2 Ventr. 208) to have been reversed in the House of Lords.

(3) Abr. Faits, K. pl. 12.

(4) 3 B. & A. 31.

Sir *G. Honyman*, in reply:—

Payment in account is, in these matters, according to the practice in *London* in such cases, equivalent to actual payment. The broker here did not refuse the policy by the authority of the Plaintiffs, and his refusal without their authority had no effect. It was executed completely as a policy, and being so, delivery and acceptance of it were not necessary to complete its validity.

The following question was put to the Judges:—

"Whether, on the facts stated in the special case, the *Victoria Fire and Marine Insurance Company* was, when the ship *Leonidas* was lost, liable as insurer to the Plaintiffs on the policy, or alleged policy, in the pleadings mentioned? It is to be assumed that the ship *Leonidas* was totally lost on the 1st of September, 1861."

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May 8.

MR. JUSTICE SMITH:—

My Lords,—I answer the question of your Lordships in the negative, on the ground that there never was, as it seems to me, a complete and available contract of insurance.

I assume it to be clear that the slip does not create a valid contract of insurance, and that it is only of avail as a proposal, or an order for a complete contract or policy of insurance. I apprehend it to be equally clear that the contract is not complete until the policy is executed, and delivered to and accepted by the assured, or some agent for him. This policy, although executed, was not in fact delivered out of the office of the Respondent, either to the assured or to his broker, *Lascaridi*, who had ordered it, and whilst it lay in the office the intended insurance was, by the broker, put an end to, on the ground that it had been put forward in mistake. I assume, in favour of the Appellants, that if the contract of insurance had been complete, *Lascaridi* had no authority to rescind the contract; but I assume also, in favour of the Respondent, that, whilst it was incomplete, *Lascaridi* had authority to intercept its completion.

The whole case, therefore, is reduced to the question, which is mainly one of fact, whether, after the policy was executed, and before it came to the hands of the assured or his broker, the contract was perfected.

The Appellants' case, on this cardinal point, wholly rests on the assumption that *Lascaridi* had made the officers of the company his agents to accept the delivery of the policy on his behalf. I think this is an assumption which is not warranted by the facts of the case. It arises from the very nature of the transaction that the person intending to insure, or his broker (when he acts through a broker), has a right to see the terms of the policy, and to object to them, if he thinks fit. This right may, of course, be delegated by the person intending to insure, and, I will assume, by his broker also; but it seems to me that clear evidence of such delegation is necessary, and the person intending to insure cannot, I think, with reason, be presumed to have delegated it to the insurers, from the fact that the policy was left in the office of the company, and not sent for; and yet such a presumption must be made if the argument for the Appellants is to prevail. The right to object to the terms of the instrument, which may obviously be of the utmost importance, would, if this presumption is made, be gone as soon as the directors have executed the policy and handed it to their own clerks.

In the result, I think that the assumption on which the Appellants' case rests is not warranted by the evidence; and I confess it seems to me that consequences full of real danger to the interests of persons intending to insure would follow from a rule founded on such an assumption. I agree with my learned brothers, who think that it is better to adhere to plain inferences of fact, than to attempt to remedy the inconveniences of a negligent mode of doing business by making the facts bend to the exigencies of the negligence.

Mr. Baron Pigott:—

My Lords,—In answer to your Lordships' question, viz. "Whether, on the facts stated in the special case, the *Victoria Fire and Marine Insurance Company* was, when the ship *Leonidas* was lost, on the 1st of September, 1861, liable as insurer to the Plaintiffs on the alleged policy in the pleadings mentioned," I answer that, in my opinion, the company was so liable.

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The facts are very fully and accurately set forth in the judgment delivered by Mr. Justice *Blackburn*, in which judgment I entirely agree. It is unnecessary for me to do more than refer to the more prominent ones in stating the grounds of my opinion.

That opinion is based upon two considerations. First, I think there was a perfect and binding contract of insurance between the parties, dated on the 1st of May; and, secondly, that it was never cancelled or made void as between the Appellants and the Respondent.

The whole difference between the parties has obviously arisen from the fraudulent conduct of *Lascaridi*, the Plaintiffs' broker; but it is equally clear, I think, that they are not to be held responsible for, nor ought their rights to be affected by, it. The authority with which *Lascaridi* was invested by the Plaintiffs was that of a broker employed to effect an insurance in the ordinary manner, with this additional circumstance only, that after he had bespoken the policy, and before it was filled up from the slip, he had express authority to procure an alteration in the terms of insurance. To that alteration the Defendant acceded, and thereupon a second slip was initialed by him for the insurance in question (the former slip being destroyed).

The case states what is the course of proceeding where, as in this case, insurance companies become the insurers. It is, that "a separate slip is prepared by the broker of the assured, and the policy is afterwards prepared from it by the company, and is *kept by them until sent for* by the assured or his broker." A separate slip was in fact so prepared for this policy, and was left by *Lascaridi* at the Defendant's office, in order that a policy might be made out in the usual course by the Defendant. Then, with regard to the premiums, it is the custom for insurance companies to give credit to the brokers for them, and to debit them in account. This was done in the books of Defendant on the 1st of May, the day of signing the slip for this policy. On the same day *Lascaridi* sent to the Plaintiffs (his principals) an account in which he debited them with the premium and duty, and he also drew upon them at the same time for the amount. This draft was accepted by Plaintiffs, and was paid at maturity. When they accepted this bill they were told by *Lascaridi* that the policy would be ready in a day or two. In a few days afterwards, a policy in the form usually adopted by the Defendant's company was filled up from the last slip, and was duly executed by two directors of the company.

It bears date on the 1st of May; it purports to have been signed, sealed, and delivered in the presence of a witness; it was therefore in form complete. In that state it continued in the custody of the Defendant until the 8th of June, when the Defendant sent a debit note for the premium and stamp to *Lascaridi's* office. At the instance of *Lascaridi* the Defendant was induced to cancel the policy, on the representation that it had been "put forward in error." This (as we now know) was a false statement on the part of *Lascaridi*. It is on the circumstance of the policy remaining in the hands of the Defendant, as above stated, that the question depends, whether the transaction constituted a complete contract in law and fact, or not. I am of opinion that it was complete.

What inference might have been drawn from the fact of its so remaining if there were no explanation about it, it is unnecessary to consider; for we have the reason given; and that reason is, not that it awaited anything to be done upon it by the Defendant, or to be assented to by the Plaintiffs, but that it was there only till sent for by the assured or his broker, or, in other words, that it remained there according to the trade usage or by tacit understanding. This reason necessarily implies that in all other respects it was a completed transaction. But farther, it is plain that the formal assent of the Plaintiffs was not wanting to any of the terms of the policy, for that was evidently intended to be, and accordingly was, made out in the Defendant's usual form, filled up with the particulars from the slip. But farther, the Defendant acted upon the policy as a perfected transaction, when, on the 8th of June, he demanded payment of the premium for which he had given credit to the broker. In the face of this demand, I confess it seems startling that the Defendant can be heard to say that there was no complete contract subsisting at that period. It was in form complete, and was shewn, by the conduct of all the parties to it, to be believed and intended by them all (apart from *Liscaridi's* fraud) to be also completely in operation.

It seems, therefore, to be reduced to this, viz.: Was it essential that the deed should be given out of the Defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense.

Sheppard, in his Touchstone, writing of the requisites of a good deed, treats, fifthly, of delivery as a matter of fact to be tried by jurors (1), and by the whole context shews that it is a question of intention. He afterwards (2) says, that "Delivery is either actual, *i.e.*, by doing something and saying nothing, or else verbal, *i.e.*, by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and a perfect deed."

Doe d. *Garnons* v. *Knight* (3) is an authority most satisfactory on this subject, and it is only necessary to quote one passage from the judgment of the Court as delivered by Mr. Justice *Bayley*. He says: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to shew that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential." This passage seems to be exactly applicable to the facts of the present case, with this addition, that there is here not only nothing to qualify the delivery, but, as above suggested, much to shew that the Defendant did intend it to be unqualified, and a deed in full operation.

The only remaining question which could arise, viz., whether the Plaintiffs were bound by the fraudulent conduct of *Lascaridi* in procuring the cancellation of the policy, was not much urged at your Lordships' bar, although it had been relied upon at Nisi Prius and in the Court of Common Pleas. It is a proposition clearly not sustainable. The act was without authority, express or implied; and it is enough to say upon it that *Lascaridi* was the broker employed to procure a policy, and from that employment it is impossible to imply an authority to cancel it. Then he certainly had no express authority, as is admitted in the special case.

I therefore answer your Lordships' question in favour of the Plaintiffs, and in the affirmative.

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(1) Vol. i. C. 4, p. 54. (2) Ibid. p. 57. (3) 5 B. & C. 692.

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MR. JUSTICE MELLOR:—

My Lords, I answer the question put by your Lordships to the Judges in the affirmative. I carefully attended to the arguments urged by the learned counsel who appeared for the parties in this case at the bar of your Lordships' House, but I confess that the observations then addressed to your Lordships did not affect the conclusion at which I arrived when the case was heard by the Judges in the Court of Exchequer Chamber. I do not venture to repeat the observations which I then made, but I humbly refer your Lordships to the judgment which was then read for me by my brother *Blackburn*(1)

My judgment depends upon the facts which I consider to be admitted by the case, viz., that the policy in question was prepared by the Defendant in conformity with the instructions of the Plaintiffs, given through their broker, *Lascaridi;* that by the mode of dealing between the Plaintiffs' broker and the Defendant, the amount of the premium and the stamp must, as against the Defendant, be treated as paid; that the policy was duly executed and delivered as a deed by the Defendant, who did everything that he intended to do to complete such execution and delivery, and that it was merely kept in his custody until called for by the assured or their broker. The Plaintiffs, as I think, were bound by it, because it was prepared in conformity with their instructions. The Defendant was bound by it, because he had accepted the terms and mode of payment of the premium and stamp, and acted upon the instructions of the Plaintiffs, and had done everything which he intended to do by way of execution and delivery of the policy as a deed, and retained it only for safe custody until sent for by the assured in the ordinary course of business.

MR. JUSTICE BLACKBURN:—

I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before the 8th of June was so executed as to bind the Defendant's company to the Plaintiffs; second, whether the transaction between the Defendant's company and *Lascaridi* (the Plaintiffs' broker) operated so as to release the

(1) See 10 Jur. N.S. 839

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Defendant from the obligation he had contracted to the Plaintiffs, supposing the policy to have been so executed.

I have already, in the judgment I delivered in the Court below, expressed the reasons for my opinion at length (1). And as I have not been induced, by anything I have heard at your Lordships' bar, to alter the opinion I then expressed, I think it better to refer your Lordships to that printed opinion than to repeat the opinion I there gave.

I have had an opportunity of perusing the opinions of my brothers *Willes* and *Smith*, and, if I understand them rightly, they agree with me in thinking that if the policy was binding before the 8th of June, what occurred subsequently would not discharge the company. I shall, therefore, say nothing more on that branch of the question.

As to the other branch, I should wish to call your Lordships' attention to what I think are the real points in controversy. They are, I think, two; one of fact, the other of law.

The question of fact is, I think, this: Was the policy really in fact intended by both sides to be finally executed and binding from the time when the directors of the Defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not.

If I thought that the parties did not in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case as to what is stated to be "always" the practice, and the statements there as to what was done in this particular case, shew that the intention of both parties was, that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger.

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(1) 13 C. B. (N. S.) 451, 10 Jur. N.S. 341

It seems that some of the Judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts.

Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a baillee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;" but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's Case* (1), it is said: "If *A.* make an obligation to *B.*, and deliver it to *C.* to the use of *B.*, this is the deed of *A.* presently; but if *C.* offers it to *B.*, there *B.* may refuse it *in pais*, and thereby the obligation will lose its force." I cannot perceive how it can be said that the delivery of the policy to the clerks of the Defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the Defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case*, by saying that *C.* must not be a servant of *A.*, though, of course, that is very materal in determining the question whether it was "delivered to *C.* to *B.'s* use," which I consider it to be, in other words, whether it was shewn that it was intended to be finally executed as binding the obligor

(1) 3 Co. Rep. 26.

at once, and to be thenceforth the property of *B*. In the present case, the assured could not have refused the deed *in pais*, for it was drawn up in strict pursuance of the authority given by them in the slip set out in the case; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it *in pais*

No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

Mr. Justice Willes:—

My Lords, I answer the question in the negative, that upon the facts stated in the special case, the Respondent (who represents the *Victoria Fire and Marine Insurance Company*), was not, when the ship *Leonidas* was lost, liable as insurer to the Plaintiffs on the policy, or alleged policy, in the pleadings mentioned.

Assuming, as upon the statement it must be assumed, that the broker had no authority to revoke this policy, if once completed, so as to be the contract of and binding upon both parties, the question is, whether it ever was so completed?

In dealing with this question as a practical one, it must be borne in mind that albeit consent, not corporal possession, makes the contract, yet the plain duty of the broker is not merely to bespeak, but to procure the policy, and to procure it upon his own credit. A loose way of business upon trust cannot abrogate any part of that duty, or make up for the consequence of neglecting it; and, indeed, taking the practice alleged to prevail as a whole, it is for the most part, viz., as to the insurances effected at *Lloyd's*, consistent with the duty of the broker to effect the policy in such a manner that his employer, or he, on behalf of his employer, should have the policy.

In the case of insurances at *Lloyd's*, no difficulty can arise, for the broker sends round the policy, and procures the signatures. When the policy is effected with a company, therefore, if analogy is to

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prevail, the broker ought to call for the policy. A careless practice, not stated to have grown into a known usage of trade, may exist of not asking for the policy, but if this be so, it is pure negligence. Nor can it be doubted that the employer in such a case, equally as in that of insurance at *Lloyd's*, is entitled to have the policy in his broker's hands. Nor could the broker, in case of any damage arising, for want of a policy, or of a proper policy, through his default in not asking for it, or looking to see that it was in order, resist an action such as was brought by the employers in *Turpin* v. *Bilton* (1).

8 QB 478

The statutes requiring contracts of marine insurance to be in writing, and stamped (35 Geo. 3, c. 63, s. 11; 54 Geo. 3, c. 144, ss. 3, 4, 5), annul contracts not so framed, consequently, a marine policy, or contract for a marine policy, to be valid, must be in writing, which, by the assent of both parties, shall represent the contract between them. But for the decided cases, it might have been supposed that upon the slip being completed, there was a contract on the part of the assurers to prepare and hand over a policy according to the slip, and that although, because of the statutes, no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy. And causes have even been tried, without objection, upon the notion that the insurance is complete from the date of the slip.

But the law, as settled by the decisions upon the construction of the statutes referred to, is, that as there can be no valid insurance, or contract for an insurance, unless by writing with the statutory requisites, the slip by itself has no binding force. Thus, it has been held, that, notwithstanding the slip, the proposed assured, upon the one hand, can insist upon being off, and can retract his order, and refuse to accept the policy: *Warwick* v. *Slade* (2), where the employer retracted the broker's authority after the slip was signed, though before the policy was completed; and, on the other hand, that the slip imposes no liability upon the proposed insurer, and there is no remedy against him until the policy is complete: *Parry* v. *The Great Ship Company* (3).

It follows that the slip, though complete, is no contract, nor even part of a contract of insurance, but a mere proposal that a

(1) 5 Man. & G. 455. (2) 3 Camp. 127. (3) 4 B. & S. 556.

10 Jur NS 294

policy of insurance shall be entered into *in futuro*, and, in case of insurance with a company, a request that the policy shall be prepared at the office. Does it follow, that when a policy is prepared in alleged compliance with the request, it shall be, without more, the contract of both the parties? That cannot be the rule, because it must be open to the customer, or to his broker, when the negotiation takes place through a broker, to object (and espepecially in the case of company policies, which do not always follow *Lloyd's* form), that the policy is wrong. In case of war, or a dangerous voyage, or, indeed, any case with a special provision, disputes may easily arise. In this very case a question might have been raised upon the omission of the running-down clause, which has been so commonly added in the margin since *Devaux* v. *Salvador* (1); and see also *Taylor* v. *Dewar* (2).

It is thus obvious that there must be power to object or refuse assent to the policy when prepared by the company; and, inasmuch as such objection or refusal touches the question, policy or no policy, it lies within the scope of the broker's authority. He may give a bad reason for his refusal, as the broker in the principal case is said to have done; but the badness of the reason assigned cannot take away from the effect of the act done, which, according to the maxim, must depend upon the power he had to do it, not upon the soundness of the reason he gave for doing it.

By way of removing this difficulty, various suggestions have been made in argument. One was that the case is analogous to a conveyance of property, where assent is presumed until disclaimer. I am not aware, however, that this doctrine of presumed assent has ever been applied to the case of a mercantile contract, with something to be done on both sides, such as to insure upon terms which may or may not be correctly expressed, in consideration of being paid, or allowed to debit in account, a premium which may or may not be commensurate to the risk.

In the case of a simple benefit conferred, to be taken as it is, or not at all, like a bond or a release, there might be room for such a presumption, though it is difficult even there to recognise a complete contract before assent. But the presumption is out of place as applied to a contract with mutual obligations, which

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(1) 4 Ad. & E. 520.

(2) 5 B. & S. 58.; 10 Jur NS 861,

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must be matter of bargain, and must be incomplete so long as either mind may dissent.

Indeed, the suggested analogy to conveyances of visible property, if it held good, would not help the Plaintiffs, but rather tend to illustrate the necessity of subsequent assent. Thus, if *B.* order of a watchmaker a watch of the same make and materials as that of *A.*, with *B.*'s name upon it, and the watchwaker makes it accordingly, intending it for *B.*, and puts *B.*'s name upon it, so that it is as much as it can be the very watch bargained for, yet, without a new assent on *B.*'s part, it does not vest in him; the watchmaker cannot make *B.* take to it, nor *B.* compel its delivery. See the argument in *Atkinson* v. *Bell* (1).

And, in like manner, as to a contract to be prepared *in futuro*, if goods are bought, to be paid for by the buyer's promissory note or cheque, payable to the seller or order, and the goods are delivered and accepted, and the buyer makes the note or cheque, and leaves it with his servant, to be handed to the seller when he calls for it, that transaction is not enough to vest the note or cheque in the seller, and the buyer may, without more, retake the note or cheque from his servant, and put it into the fire.

It is clear, therefore, that the doctrine of presumed assent to a conveyance will not help, and that the mere previous request (even though binding as part of a contract), that a contract, which, to be valid, must be in writing, shall be prepared by one of the parties, proposing to contract, for the other, has not the effect of vesting a right in any contract in writing if and when so prepared, and much less can a previous colloquy, not binding as part of a contract, have that effect.

As another way of getting out of the difficulty, it was suggested to assume that the insurance company, or servants of the company, were made agents of the employers of the broker, for the purpose of assenting to the policy on their part. That would, however, be simply assuming the thing that is not, for the sake of shutting out an unpleasant consequence of the thing that is. To hold an auctioneer, or common broker, or other independent go-between, to be authorized to complete the contract for both buyer and seller, is but a necessary conclusion of fact from his being their common agent. To reason thus as to a clerk or servant of one of the parties, employed by him in a dependent capacity to attend to his business, involves a contradiction, and has no foundation of fact.

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(1) 8 B. & C. 277.

These sources of light thus failing, let the transaction itself be examined with attention. It has been observed that the slip amounts only to a proposal that a policy shall be prepared upon certain terms. Those terms, so far as they are to bind the insurer, commonly include some known uniform ones, as to which there can be no question, but also others applying to the particular transaction, sometimes obscurely worded, sometimes imperfectly understood, and as to which disputes may arise. This consideration alone keeps the policy *in fieri* until objection is waived. On the other hand, the terms, so far as they are to bind the assured, include, besides the implied warranties, payment of premium, either in cash, or by being credited in account.

If, then, the Plaintiffs had ordered the policy without the intervention of a broker or his obtaining credit for himself, they could not have insisted upon receiving it without paying the company in cash. Had the directors offered them the policy, and had they refused to pay for it, they might have treated the negotiation as at an end, and cancelled the proposed policy. Had the loss happened before the Plaintiffs called for the policy and paid the premium, the same result would follow, though the insurers might not choose to take advantage of a short delay. So much for a cash transaction.

If the directors agreed to insure against the Plaintiffs' promissory note at a month, like considerations would arise. Had they in such case prepared the policy, and left it with their clerk, and the Plaintiffs had drawn the note, and left it with their clerk, it is difficult to see why, without more, the policy should vest in the Plaintiffs and not the note in the company, which, without more, it clearly would not.

In the principal case the directors were content to take the broker's credit instead of cash; that is to say, instead of stipulating for cash down they stipulated for the broker's allowing them to charge him in account with the premium; and this the broker, refusing to take to the policy, refused to allow them effectually to do, and so put the directors in the same position as if they had stipulated for cash, and cash had not been paid.

Some confusion has arisen from an attempt to deal with this case as if it had been that of an agent of a named principal, undoing, without authority, a contract which he had completely effected in pursuance of his authority. The case ought not to be so regarded. The broker was an agent to procure a policy in consideration of a payment to be made to him by his employers, with whom, directly, the Defendant had nothing to do, he taking care that the policy was effected upon the given terms and upon his credit, the Defendant looking to him for payment, and having no claim against his employers. Inasmuch, then, as the broker has to exercise a judgment upon the sufficiency of the policy, it was necessarily within the scope of his authority to reject that prepared as not being one, or the one, ordered. When he does so properly his employer gets the benefit; when he does so improperly his employer has his remedy by action against the broker. But the Defendant, who dealt with the broker only, and stipulated for his taking to and being debited for such a policy, must, upon his rejecting it, and refusing to be debited in account with the premium thereupon, have an equal right to consider the negotiation at an end, and to cancel the proposed policy, as if cash had been stipulated for and refused.

The transaction cannot properly be split up into parts. It stands upon the same footing as if, upon one and the same occasion, the broker had ordered the policy at the Respondent's office, and whilst he waited for it the seals had been affixed to a form of policy in another room, and before he received or assented to the policy he had said, "Stay; I made a mistake. I decline to take up the policy, and you must not charge me in account with the premium." Whereupon the form was cancelled.

No subsequent protest by the principals that their agent ought to have acted otherwise can avail them. Their payment of the premium was not made to the insurers, but to their own ill-conducted broker, and their remedy must be against him. The Defendant has not received, but has been refused, the premium; and he was in no default, because he acted upon the refusal of the broker, to whom the whole business of effecting the policy was left.

The fallacy of the argument for the Plaintiffs consists in separating the preparation of the policy from the rejection of it by the broker, and thus splitting up into several contracts, one of which is alleged to be authorized and the other not, what in reality, though distinct events in point of time, constituted together but one negotiation, which, by reason of the misconduct of the Plaintiffs' agent, was abortive.

The question is thus answered in the negative.

July 16. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, the difference of opinion which has prevailed amongst the learned Judges in this case must necessarily diminish the confidence which I feel in the judgment I have formed upon it, more especially as that judgment is not in accordance with the views of the majority of the Judges.

The question is one more of fact than of law; and therefore, in considering it, it will be necessary to refer to the facts contained in the special case:—[His Lordship stated them very fully].

The usage with respect to premiums upon insurances effected by brokers is clearly explained by Lord *Ellenborough* in *Jenkins* v. *Power* (1), and by Mr. Justice *Bayley* in *Power* v. *Butcher* (2). The latter learned Judge says (3): "According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter."

The questions which arise out of the facts of the case are:—1st. Whether there was a complete contract of insurance between the parties? and, 2nd. If there was a complete contract, whether it was afterwards cancelled by the Plaintiffs' authority?

Upon the first question we have no evidence of the fact of the execution of the policy, except that which arises upon the face of the

(1) 6 M. & S. 282. (2) 10 B. & C. 329. (3) Ibid. 339.

instrument itself, and upon the facts stated in the special case that the policy (which must be taken to mean the executed policy) is kept by the company until sent for by the assured or his broker. The policy purports to be signed, sealed, and delivered by two of the directors of the company in the presence of *Reginald Scaife* resident secretary. This statement on the face of the policy that all acts were done to render the execution complete, which is acknowledged by the directors who executed it, must, I think, be taken to be conclusive against the company, that it was not only signed and sealed, but also delivered. We all know the formal mode of executing a deed by the words, "I deliver this as my act and deed"—a form which, no doubt, or something equivalent to it, was observed upon this occasion. The policy, most probably, was afterwards given to the secretary, to be kept till called for. Now, although the policy was thus retained by the officers of the company, when formal execution of it had taken place, they held it for the Plaintiffs, whose property it became from that moment. It is a mistake to suppose, as some of the learned Judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by *Lascaridi*. The usage of insurance companies, to keep the policy until sent for by the assured or his broker, is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience. And as to *Lascaridi's* acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the Plaintiffs, to effect an insurance upon their vessel upon certain terms dictated by them. He prepared the slip according to his directions. When the policy was executed, in exact conformity to his instructions, his duty was so far discharged; and without the authority of the Plaintiffs he could not refuse to accept it. They had effected, through their agent, a complete binding contract, which they alone could have a right to abandon.

It is hardly necessary, after the preceding observations, to say anything upon the second question, as to the supposed cancellation of the policy. All the Judges seem to have thought that if the contract was binding, *Lascaridi* had no authority to cancel it. The company could not have been led from anything in the previous transaction respecting the same vessel, to suppose that *Lascaridi* was authorized to act beyond the ordinary scope of the authority of a broker. It is one thing to cancel a slip, which is merely the inception of a contract, and to change the terms of the proposal for an insurance; and an entirely different thing to release the underwriters from their liability upon a policy. It is quite clear that *Lascaridi* had no authority from the Plaintiffs to relinquish on their behalf the benefit of a contract to which they were entitled, and that the company had no reason to suppose that he possessed any such authority.

I think that the judgment of the Exchequer Chamber was wrong and ought to be reversed, and that judgment should be entered for the Plaintiffs.

Lord Cranworth:—

My Lords, my noble and learned friend has gone so fully into the facts of this case, that I shall not farther advert to them, but shall assume that they are present to the minds of your Lordships.

There is one part of this case which seems to me to admit of no doubt. If the policy was so executed as to have become a complete instrument, binding on the Respondent, and giving a good right of action to the assured in the event of a loss, I think it clear that he could not cancel it at the instance of *Lascaridi*. The insurers had a right to consider him as having authority to do all which a broker can do in discharge of his duty in effecting a policy, and they might safely settle with him in case of a loss, if that be the ordinary mercantile usage; but there is no suggestion that it is part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into.

The only semblance of plausibility in support of such an argument was, in this case, the fact that on a previous occasion he had an authority expressly delegated to him by the Plaintiffs to cancel something—but that was an authority, not to cancel a policy, but to cancel a slip. They had originally proposed, through *Lascaridi*, to effect a policy on the *Leonidas* with the Respondent, on terms materially differing from that ultimately acted on, and a slip had been signed, and handed to the Respondent for that purpose, five days before the signing of the slip on the 30th of April; but on that latter day, and before anything had been done, *Lascaridi* called on the Respondent, at the instance of the Appellants, expressing their desire to substitute the terms of insurance ultimately acted on, instead of those originally proposed. To this the Respondent agreed, and the slip dated the 30th of April, 1861, was accordingly prepared, and left with the Respondent as the groundwork of the policy to be prepared by the company. It was suggested that as the Appellants had thus authorized *Lascaridi* to make this important change in the nature of the contract to be entered into, the Respondent might reasonably suppose he had authority to sanction the cancellation of a policy already validly binding on the assurers. To this I cannot accede—as it is admitted that *Lascaridi* had not, in fact, any authority to cancel the policy of the 1st of May. If it was a binding instrument, his act cannot affect the Appellants, unless it was done according to some ordinary course of business which would warrant it. I can see nothing whatever to warrant such an assumption. And, indeed, the point was not much insisted on. The point really argued was, that the circumstances are not such as to shew that any absolute liability ever attached on the company. The policy, it is said, did not become a binding contract on the company until it had been taken from the office by the Appellants or their broker, and been accepted by them as the terms by which they were to be bound.

There is no direct evidence as to what actually took place when the policy was, according to the practice (as stated in the language of the special case), filled up from the slip by the officers of the company; but as the policy purports to have been signed, sealed, and delivered by two directors of the company in the presence of the registrar, in pursuance of the powers and directions contained in the deed of settlement of the company, the fair inference is, that this was the course prescribed by the deed, and that that course had been duly followed.

But, as to the effect of what was so done, the parties differ. The Appellants contend that by thus signing, sealing, and delivering the policy, the directors made it an instrument thenceforth binding on the company. On the other hand, the Respondent contends, that until the policy was taken away by the assured, or his broker, it did not become binding on the company.

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This latter view is that which has been taken by the great majority of the learned Judges; and it is therefore not without some hesitation that I have arrived at a different conclusion, and that I concur with the opinions of the small majority of the Judges who heard the case when it was argued at your Lordships' bar. I am of opinion that from the moment when the directors, acting, as I infer they did, in pursuance of the powers and duties conferred and imposed on them by the deed of settlement, executed the policy, it became absolutely binding on the company; and that it was not necessary, in order to give it binding efficacy, that it should be taken away by the Appellant or his broker.

I come to this conclusion on the following grounds:—In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow.

If, therefore, the directors who executed this policy, delivered it only conditionally, *i.e.*, to take effect only when taken away by the Appellants or their broker, then, as it was not so taken away, it never became operative. But I can discover nothing leading to the inference that there was any such condition attached to the delivery. The expression in the case that the policy is kept by the company until it is sent for by the assured or his broker, can only mean that this is the ordinary course of practice. But such a practice cannot, without more, have the effect of converting that which would otherwise be an absolute, into a conditional delivery; of converting delivery as a deed into delivery as an escrow. The practice referred to is, at least, as consistent with the hypothesis of delivery as a deed as of delivery as an escrow. A policy of this company can only be executed (as I presume) when certain of the directors and officers of the company are assembled; and this explains why it is executed in the absence of the party assured. The practice assumes the previous assent on the part of the assured to the policy to be executed. It is not the practice that the assured should call for or examine the policy before he takes it away, but that he should *send* for it, evidently treating it as an instrument complete before it is taken away from the office. If, when it has been sent to him, he should discover that it is not conformable with the slip, his only remedy would be a remedy in equity to get it corrected according to the real meaning of the parties.

I know of nothing intermediate between a deed and an escrow. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterwards acquires that character. The practice is, that it should be kept by the company till sent for by the assured or his broker; not till the assured has had an opportunity of examining it, so as to ascertain that it is conformable to the slip.

It can hardly be argued that after the assured has sent for and obtained possession of it, the company is not bound by it, even if it is not in conformity with the slip. Suppose the liability of the company, according to the slip, was to endure for a year, but that by the policy it is restricted to six months, the assured on receiving the policy and discovering the error might well object, and insist on having a different policy; but yet if a loss should happen within the six months, it surely cannot be doubted that the company would be liable on the policy actually executed. So if a loss should occur while the policy remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be, because it had been completely executed, though never seen and approved by the assured. And if executed, I am of opinion that it became complete when signed, sealed, and delivered. If the usage had been that it should, after being signed, sealed, and delivered, remain in the hands of the secretary till the assured or his broker had done some act signifying his approbation of it, that might have raised a question whether, until that approbation had been expressed, it was more than an

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escrow. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterwards by some act of the assured.

On these grounds I have come to the conclusion, after much consideration, that the three learned Judges who were the majority giving their opinions to your Lordships were right; and so, that judgment ought to be for the Appellants.

Judgment reversed; and judgment given for the Plaintiff.
Lords' Journals, 16th July, 1867.

Attorneys for the Appellants: *Cotterill & Sons.*
Attorneys for the Respondent: *Roy & Cartwright.*

RICHARD OAKES . . . . APPELLANT;
AND
WILLIAM TURQUAND AND R. P. HARDING RESPONDENTS.

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July 22, 23, 25, 26, 29;
Aug. 15.

IN THE MATTER OF THE COMPANIES ACT, 1862; AND IN THE MATTER OF OVEREND, GURNEY, & Co., LIMITED.

W. PEEK, THE YOUNGER *v.* THE SAME.

Company—Contribution—Fraud—Winding-up.

Where a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, but he may rescind it. But he must do so within a reasonable time.

A contract induced by fraud is not void but voidable; and therefore though the persons who by their fraud induced it may not enforce it, other persons may, in consequence of it, acquire interests and rights, which they may enforce against the party who has been so induced to enter into it.

The Limited Liability Acts previous to 1862 do not destroy, but only restrict, the liability of a shareholder in a company formed under their provisions, and change the form of enforcing it.

The direct remedy of a creditor of an incorporated company is solely against the company, and not against its individual members as upon a contract with them. But though, as between the company and the member, the member might have a good legal or equitable defence to a call upon himself, he may be liable to contribute to the assets of the company required for the payment of the company's creditors.

3 Ch App 44-3-5
-461, 494, 785
5 Eq 255
— 470
6 Eq 511
3 HL 170
— 349. 350
351, -9,
4 C.P. 12
7 Eq 133, 160, -
— 280, -4,
4 Ch 180, -3
— 269
— 711, 714, -8,
10 Eq. 506
11 Eq [illegible]
12 Eq 471

2 HL-Sc. 29. 33, 38
15 Ch D. 509, 510-23
4 HL. 69. 70, 3, 6, -8, -9, 80, -2
4 Ch 499, 500, 509, 512, -3, 536, 687-8.
5 Ch 375, 6 C.P. 64
6 Ch. 269

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A member of a limited liability company which is wound up, resembles, with respect to creditors, a member of a company under the Acts of 1844, or a partner in a partnership which has become bankrupt. The only difference is as to the extent of the liability.

The *Companies Act* of 1862 did not introduce any rules or principles applicable to the acts or conduct of a shareholder in a company different from those which previously existed, but merely changed the form of proceeding so as to fit it to be applied to the principle of limited liability.

By that Act a contributory is a person who has agreed to become a member of the company, and whose name is upon the register.

Where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which, as setting forth the true objects of the association, *A.* had become a shareholder, though he, on discovering the difference, might have repudiated his shares, he could not after the failure of the company relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known.

It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of neglect.

The certificate of the registrar under the *Companies Act*, 1862, is conclusive that all previous requisites have been complied with.

Semble, that at a meeting of shareholders called to agree to a voluntary winding up of a company, liquidators may be lawfully appointed, though no notice of the resolution to appoint them has been given.

A. applied, on the faith of statements in a prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. *A.* then applied to have his name removed from the list of contributories:—

Held, affirming the decision of *Malins*, V.C., that it was properly placed there.

Henderson v. *The Royal British Bank* (7 E. & B. 356) adopted.

A variance between a prospectus and the memorandum of association of a company will not, necessarily and as of course, relieve a member of the company from his liability as a contributory.

Two persons, an original allottee of shares and a purchaser of shares, separately moved the Court to discharge an order declaring them contributories in the matter of a company which was being wound up. Their motions were refused with costs, and the Vice-Chancellor's order contained a direction requiring them (jointly in point of form) to pay costs to the liquidators:—

Held, that this form was erroneous; and that each must be made answerable for the costs incurred in his own petition.

6 Ch 564
12 Eq 346.
7 Ch 57.-8.-9
13 Eq 94.
13 Eq 572
6 HL 481
7 CP 635,
8 Ch 258
15 Eq 239, 240
16 Eq 426
8 Ch 808
9 Ch 10, 665
6 HL 381.
20 Eq 363.
2 Ch D. 613-5
3 Ch D. 750
[illegible] 142,
Ch D, 380
App Cas 1008, 1010
App Cas 350
353
46-9, 621-3,
550-9 661 (1) L C 3 Jur N.S. 111.
23 Ch D 424-5, 433-4-6-7
See for [illegible] appellant Peek agst [illegible]
Peek v Gurney LR 13 Eq 79 and 6 HL 377

THE first of these cases was an appeal against a decision of Vice-Chancellor *Malins*, by which the name of Mr. *Oakes* was kept on the register of members of the company called "*Overend, Gurney, & Co., Limited*," and he had been held liable to answer any call

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that might be made upon him by the liquidators appointed to wind up the company.

The second was an appeal by Mr. *Peek* against a like decision, the only difference between the two cases themselves being, that Mr. *Oakes* was an original allottee of the shares in respect of which liability was fixed on him, while Mr. *Peek* had purchased his shares in the ordinary way.

Both the Appellants alleged, in substance, that the representations made by the directors of the company were false and fraudulent, and that in consequence of such false and fraudulent representations, and by means thereof, they had become the holders of the shares. They insisted, therefore, that they were, as a result of the imposition practised upon them, released from all liability to have their names kept on the list of members, and be made to contribute to the debts of the company. The company had begun business on the 1st of August, 1865, and stopped payment on the 10th of May, 1866. On the 11th of May Vice-Chancellor *Kindersley* made an order appointing, provisionally, Messrs. *Turquand* and *Harding* to be the official liquidators of the company. An extraordinary general meeting of the members of the company was called for the 11th of June, 1866, "to consider the position of the affairs of the company, and, if deemed expedient, to pass the following resolution:—'That the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same voluntarily.'" The meeting was held, and 363 shareholders, representing 30,193 shares, were present, and 623 shareholders, representing 26,312 shares, sent proxies. The resolution actually passed was this:—"That it has been proved to the satisfaction of this meeting that *Overend, Gurney, & Co., Limited*, cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same voluntarily, under the supervision of the Court, and that *William Turquand* and *Robert Palmer Harding*, of &c., be and are hereby appointed liquidators." Two shareholders (Mr. *Henry Kingscote* and Mr. *Henry Grissell*) and one depositor (Mr. *Charles Oppenheim*) were appointed a committee of supervision.

Petitions for winding up the company were presented, and were heard before Vice-Chancellor *Kindersley* on the 22nd of June, 1866,

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when the following order was made:—"That the voluntary winding up of the said *Overend, Gurney, & Co., Limited*, referred to in the affidavit of *William Bois*, filed on the 22nd of June, 1866, be continued, but subject to the supervision of this Court, and that *William Turquand* and *Robert Palmer Harding* be continued as liquidators, and that any of the proceedings under the said voluntary winding-up might be adopted, as the Judge should think fit."

The liquidators put the names of Mr. *Oakes* and of Mr. *Peek* on the list of contributories; and on the 20th of August, 1866, made a call of 10 per cent. on the members of the company in respect of the unpaid portion of the shares. Notice of motion to remove the names of these Appellants from the list, and to stay, as against them, all proceedings on the call, having been given, the motion was heard before Vice-Chancellor *Malins*, who, on the 9th of February and the 7th of March, 1867, made orders dismissing the motion, and directing that Mr. *Oakes* and Mr. *Peek* should pay the costs of the liquidators, and that the costs of Mr. *Oppenheim*, the depositor, who represented the creditors, should come out of the assets of the company. This appeal was brought against these orders.

The facts of the case necessary to raise the question of general liability were those above indicated. They have been so fully and so recently published in these Reports (1), and are so frequently mentioned by the noble and learned Lords in their judgments, that it has been deemed inexpedient to repeat them here. But a point was raised in this House as to the registration of the memorandum or articles of association, and as to that the facts were these:—The third article of the memorandum of association was in these terms: "The objects for which the company is established are—the receiving money on deposit, or by re-discount of bills, and the employment and investment of such money, and of the paid-up capital of the company in the discounting of bills, promissory notes, and other negotiable securities, and in making advances in loans, and investing in securities, and generally, the carrying on of the business of bill brokers and money dealers, as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, at No. 65, *Lombard Street*, in the city of *London;* and, with a view to the above objects, the acquisition of such business upon terms to be agreed by the

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(1) Law Rep. 3 Eq. 576.

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directors, and the acquisition, whether by way of purchase or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms, as the directors shall think expedient, and the doing of all *such* acts and things *as may, in the opinion of the directors, be* incidental or conducive to the attainment of the above objects."

On the 13th of July, 1865, Mr. *C. E. Jones*, the attesting witness to the memorandum of association, took it for registration to the Registrar of Joint Stock Companies. The registrar refused to receive it, unless the words marked above in italics were struck out. Mr. *Jones* consented, and they were struck out at once, without any communication being had with any other person. The memorandum was then registered.

Another point raised on the appeal was, that the Appellants ought not to have been ordered to pay the costs of the liquidators, especially not those of Mr. *Oppenheim*, as no notice of motion had been served on him, and also that the order to pay costs (which was in form an order on the Appellants jointly) was erroneous in that respect.

Mr. *Markham Giffard*, Q.C., and Mr. *Swanston*, for the Appellants:—

After very minutely stating the circumstances of the case, with a view to shew that the representations made by the projectors of the company, who constituted themselves its directors, were false and fraudulent, and were so within the knowledge of those persons, who carefully concealed this knowledge from the public, they contended that these circumstances put an end to the Appellants' liability. It was the duty of the promoters of a company to put those who were invited to be shareholders into a position to know the truth: *The Venezuela Company* v. *Kisch* (1), where the rule was laid down independently of any question of fraud in the concealment of facts. Even in *The Western Bank of Scotland* v. *Addie* (2), where the shareholder had received dividends and acted in the management of the concern, and so was held liable, it was declared that an action for deceit would, in a case of fraudulent representation, lie against the directors; and

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(1) Law Rep. 2 H. L. 99.

(2) Law Rep. 1 H. L. Sc. 145.

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though such action would not lie against the company in respect of the conduct of the directors, yet no rights would vest in the company as against the individuals thus defrauded. Statements so made in a prospectus as to produce a false impression, in consequence of which a contract is entered into, will not sustain that contract as a binding contract, even though such statements were not made with the wilful intention to deceive: *Smith* v. *The Reese River Mining Company* (1). When that case was before the Lords Justices, Lord *Cairns* expressly stated (2) that, "with regard to companies established under the Act of 1862, there is no contract whatever between a creditor of the company and a shareholder of the company. When the Legislature introduced the principle of limited liability it was absolutely necessary to give effect to that principle by setting up the company, and the company alone, as that with which creditors, or third persons, could contract." That opinion is decisive against the present claims. Here, too, the fraudulent intention could not be doubted; it was proved, not merely by the fact that the statements were in themselves untrue, but by the execution of the secret deed, which was intended to provide for a state of things carefully concealed from the public, and which was concealed from the public because if it had been disclosed not one person would have become a shareholder in the projected company. The shareholders had no means of testing the accuracy of the representations made to them, and their not having done so affords no answer to their claim for relief. Nor will the length of time that elapsed have that effect: *Rawlings* v. *Wickham* (3); *Bell's Case* (4).

The fact that this is a proceeding under a Winding-up Act makes no difference as to the rights of the parties. There may be a winding-up where there are no creditors. It does not preclude a party from disputing his liability: *Chapman and Barker's Case* (5). It is a mere substitute for the old proceedings under a dissolution of partnership. It settles the proportions of contribution among the parties who are really liable, but does nothing more.

Then it is said that even if the company could not enforce the

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(1) Law Rep. 2 Eq. 264, 12 Jur. N.S. 616.

(2) Ibid. 2 Ch. Ap. 616.

(3) 1 Giff. 355; 3 De G. & J. 304. 4 Jur. N.S. 990; 5 ib. 278

(4) 25 Beav. 35, 2 Jur. N.S. 844,

(5) Law Rep. 3 Eq. 361.

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contract against the shareholder on account of the misrepresentations by which he had been induced to enter into it, the creditors of the company are still entitled to the benefit of it. *Bright* v. *Hutton* (1) laid down the general proposition that a contributory was a person who had entered into a contract with the creditors. Without such contract he would not be liable. *The Bwlch Mining Company's Case* (2) shews that a person who has been fraudulently induced to become a member of a company may, upon discovering the fraud, absolutely repudiate his contract, and relieve himself from his membership, and the creditors have no right against the deceived shareholder, for, as is there stated, "the creditors trust those who are liable as shareholders, those against whom the company is entitled to enforce the duty of shareholders." The company has no such right here, and the creditors of the company could not be in a better situation than the company itself, and consequently could not have any right to enforce against these Appellants "the duty of shareholders." [THE LORD CHANCELLOR:—The case here comes to this: The creditor finds the shareholder in the position in which the statute makes him a contributory. The creditor has then a right to come against him. At that time he has not avoided his liability; can he afterwards do so at his pleasure?] But before establishing any such right the creditor must shew that he became creditor in consequence of the credit he gave to the company, through the fact of the particular shareholder being a member of it. The doctrine of "holding out," as applicable to private partnerships, cannot apply to a case like this; besides, it would be contrary to the fact to introduce it here. There is not a particle of such proof in this case.

The principles acted on in *Cox* v. *Hickman* (3), which was the case of a private partnership, cannot properly be applied to a company, but even there it was declared that to make a man liable as a partner he must do some act by which a person is induced to give credit to the partnership. *Fox* v. *Clifton* (4), had previously announced the same rule, and in *Pott* v. *Eyton* (5), Lord Chief Justice *Tindal* founded his judgment on the circumstance that

(1) 3 H. L. C. 341.
(2) Law Rep. 2 Ex. 324.
(3) 8 H. L. C. 268, 304, *et seq*, 7 Jur N S 105
(4) 6 Bing. 776.
(5) 3 C. B. 32.

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"there was no evidence to shew that credit was in fact given to *Eyton.*" Nothing was done here as in *Cockerell* v. *Aucompte* (1), or *Caldicott* v. *Griffiths* (2). No one living creature can shew, or even pretend to shew, that he gave credit to this company on account of Mr. *Oakes* or Mr. *Peek* belonging to it. The creditors here looked to the general company alone, and must recover from the company alone. The ordinary doctrine of liability upon taking shares in a company was applied in *Mixer's Case* (*Re Royal British Bank*) (3), overruling *Brockwell's Case* (4), but there the shareholder had executed the supplementary deed, and had received interest on his shares; besides which, *Mixer's Case* proceeded on different Acts of Parliament, namely, the Acts of 1848, 1849.

The cases of *Henderson* v. *The Royal British Bank* (5); *Daniell* v. *The Royal British Bank* (6); and *Powis* v. *Harding* (7), do not establish the liability here sought to be enforced. They depended on the special provisions of a particular statute, which gave an individual creditor a right to recover as against an individual shareholder. The provisions of the *Companies Act* of 1862 are entirely different. And even as to the former statute itself, and with regard to the same banking company, it was held in *Nicol's Case* (8) that shareholders who had been induced to become so by the fraud of the company, if they applied to be relieved as soon as they discovered the fraud, could not be placed on the list of contributories as generally liable for the debts of the company, but were so only when by their own acts, such as receiving dividends, and, though with the means of knowledge, not obtaining it, and not repudiating their shares, they had made themselves substantially members of the company. And *Clarke* v. *Dickson* (9) (though the decision there was adverse to the shareholder) distinctly recognises the principle that a person induced by fraud to enter into a contract under which he pays money, may rescind it at his option if he has not taken the benefit of the contract, and can restore the parties to the same situation in which they were when he entered into the contract.

(1) 2 C. B. (N.S.) 440; 3 Jur. N.S. 844
(2) 8 Ex. 898.
(3) 4 De G. & J. 575,
(4) 4 Drew. 205; 3 Jur. N.S. 880
(5) 7 E. & B. 356. 3 Jur. N.S. 1111
(6) 1 H. & N. 681. 3 Jur. N.S. 1119
(7) 1 C. B. (N.S.) 533; 3 Jur. N.S. 113
(8) 3 De G. & J. 387, 421; 5 Jur. N.
(9) E. B. & E. 148.

The prospectus and the memorandum here did not agree together. It was on the statements contained in the former that Mr. *Oakes* asked for his shares. The difference between the two documents avoided his contract. Those differences were very considerable, and if he had known the powers assumed by the directors under the memorandum or articles of association, he would not have taken the shares. *Ship's Case* (1), *Stewart's* (*The Vyksounsky Ironworks Company*) *Case* (2), and *Webster's Case* (3) (as to the same company), shew that the difference between these instruments entitles the Appellant to have his name removed from the list of shareholders.

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Then the alteration in the memorandum itself put an end to all claim on the part of the company. The *Companies Act* of 1862 (25 & 26 Vict. c. 89), required the memorandum or articles of association, "signed by the subscribers to the memorandum," to be registered. That had not been done here. A memorandum was agreed to in a particular form—that form was subscribed as required by the statute, but before it was registered the form was altered by the act of the attesting witness without any assent on the part of the subscribers. There had, consequently, been no registration of the memorandum as required by the statute. This was not, therefore, in any sense an incorporated company within the terms of the statute. *Master* v. *Miller* (4), *Davidson* v. *Cooper* (5), shew that by the rules of law, independently of the statute, the alteration in the memorandum not having been assented to by the subscribers before the registration, it was wholly void: *Pigot's Case* (6) established that principle, and shewed that such a defence could be set up by plea of *non est factum*. *Doe* d. *Lewis* v. *Bingham* (7) appears to place on this rule the restriction, if the alterations were such as to affect the interest of the party objecting to them, but it admits the general rule itself. Here the alteration was such as materially to affect the interest of all parties.

There was no resolution properly passed for a voluntary winding up of the company. The resolution that did pass was not regular,

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(1) 2 De G. J. & S. 544; 11 Jur NS 331.
(2) Law Rep. 1 Ch. Ap. 574; 12 Jur NS 758
(3) Ibid. 2 Eq. 741.
(4) 4 T. R. 320.
(5) 11 M. & W. 778.
(6) 11 Co. Rep. 26.
(7) 4 B. & A. 672.

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for the notice which convened the meeting stated something very different from that which was adopted. There was, consequently, no valid voluntary winding up of the company, and the liquidators were improperly appointed: *In re The Stearic Acid Company* (1). If so, they had no right to make a call, and the order of the Vice-Chancellor, that they should be continued, could not make that valid which was originally and in itself invalid. The Vice-Chancellor's order was to continue the voluntary winding-up, and to continue the two persons appointed as liquidators. But there being no valid resolution for a voluntary winding-up, nor any valid appointment of liquidators, the Vice-Chancellor's order to continue both could not give force and validity to either of them. *The New Brunswick Company* v. *Boore* (2), is not applicable here, for the Appellant had not signed the memorandum of association, nor done any act as a member of the company. *Ward and Garfitt's Case* (3) was cited as to the power of the Court to alter the register.

Then, as to costs, there were two motions heard on two several notices. One order was made. Mr. *Oakes* and Mr. *Peek* were ordered, jointly and severally, to pay the costs. That was erroneous; there ought to have been separate orders, and each ought to have been ordered to pay his own costs. [THE LORD CHANCELLOR:—The House may make a proper order as to costs.]

Sir *R. Palmer*, Q.C., and Mr. *Mellish*, Q.C., for the Respondents, the liquidators:—

There are three questions in this case. First, whether on the original facts there ever was an equity of which Mr. *Oakes* would have been entitled to avail himself for the purpose of repudiating his shares in this company. On this question it was contended at much length that there had been no fraud practised and no misrepresentations put forth. Secondly, supposing there had been such an equity, if it had been taken advantage of in a proper time and manner, could it be so after the actual failure of the company? Thirdly, is it not clear by express enactment that this contract for shares entitled the creditors of the company, after the winding-up order was made, to come on these Appellants for contribution.

The Appellants here are liable to the creditors, no matter what equities they may have (if they have any), against the other shareholders. The party to be charged with liability must no doubt be a shareholder by the terms of the deed. That was so under the law which gave the creditor a remedy by *scire facias: Steward* v. *Greaves* (1); *Ness* v. *Angas* (2); and *Ness* v. *Armstrong* (3). That condition was fulfilled in this case. The Appellant was a shareholder by virtue of the deed of association, and the Act of 1862 makes him a shareholder as to creditors without reference to any equity as between himself and other shareholders. There was no necessity therefore to refer to the doctrine of "holding out" and the rules as to private partnerships. The fact of being a shareholder involved the consequence of being liable as a contributory. It was so in *Saunderson's Case* (4), though the transfer of the shares had not been fully completed; and in *Dodgson's Case* (5), where it was alleged that the shareholder had been deceived into taking the shares, it was held that though he might have a remedy against the directors, yet they were not so much the agents of the whole company as to affect its rights, and prevent the shareholder from being placed on the list of those who were to contribute to its assets. *Sutton's Case* (6) is to the same effect. Then came *Henderson* v. *The Royal British Bank* (7), *Daniell* v. *The Royal British Bank* (8), and *Powis* v. *Harding* (9). The first of these cases was important, and if not overruled must govern the present. It decided that, under the 7 & 8 Vict. c. 113, if there was an unsatisfied judgment against a joint stock bank, and it was sought to charge a shareholder therewith, he could not resist the claim on the ground that he was induced to become a shareholder by fraud on the part of the bank, and repudiated the contract as soon as he discovered the fraud, which was not until after the bank had stopped payment. The expressions used in the judgment of the Court, as delivered by Lord *Campbell*, were very strong. The opinion attributed to Lord *Cairns* in the *Reese River Mining Company's Case* (10), has been mistaken. His Lordship, in denying that under the Act of 1862 there was any contract between a creditor

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(1) 32 L. J. (Ch.) 784.
9 Jur. N.S. 1066

(2) 3 H. & N. 249.

(3) Law Rep. 4 Eq. 189.

(1) 10 M. & W. 711.
(2) 3 Ex. 805.
(3) 4 Ex. 21.
(4) 3 De G. & Sm. 66.
(5) Ibid. 85.
(6) 3 De G. & Sm. 264.
(7) 7 E. & B. 356; 3 Jur NS 111,
(8) 1 H. & N. 681. 3 Jur NS 119,
(9) 1 C. B. (N.S.) 533. 3 Jur NS 138
(10) Law Rep. 2 Ch. 604, 616.

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of the company and a shareholder of the company, did not mean to imply that the shareholder was freed from all liability to the creditor, but only to shew that under the Act of 1862 the liability did not assume the direct form of liability by contract. The contract may be with the company alone, but the shareholder is bound to the company to make good the engagements of the company, and is not protected against such an obligation farther than by the amount settled upon the principle of limited liability.

The Act of 1855 (18 & 19 Vict. c. 133) provided for the formation of limited liability companies, but kept them on the same footing as to general law as other companies. It abolished the proceeding by *scire facias* against the individual members, but it did not relieve them from all liability to creditors. It changed the form of enforcing their liability. The Act of the next year was similar to that afterwards passed in 1862, except that it omitted banking companies from its provisions. These were afterwards included by 21 & 22 Vict. c. 49. When new legislation was introduced the *scire facias* was not renewed, but the proceeding by winding up was adopted. The 18th, 23rd, 35th, 38th, 74th, and 82nd sections of the Act of 1862 (25 & 26 Vict. c. 89), are important clauses, on which the decision of this appeal must depend. They establish the liability of the shareholder to contribute to the debts of the company. The 18th section related to the incorporation of those who had subscribed the memorandum and of those who should afterwards become members, all of whom were to deemed incorporated by registration. The 23rd section answered the question who were to be members; they were, first, the subscribers to the memorandum, and next, " every other person who has agreed to become a member of the company, and whose name is entered on the register of members." The Appellants clearly come within that description. It is to be remarked that the 30th section prohibits any notice of a trust being received on the register, a prohibition, which shews the intention of making the register evidence of liability without allowing any question as to trust. In like manner, the 35th section shews that the register was intended to be conclusive evidence of the liability of the members. That section declares, that if the name of any person is improperly entered, or improperly omitted to be entered, on the register, complaint may be made by the person aggrieved, by any member of the company, or by the company itself, to one of the Superior Courts, that the register may be rectified. Then, by the 38th section, in the event of a company formed under the Act being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company. There is no restriction of any kind here. Membership is the test of liability. On what principle is it that the creditors of this company are to be deprived of the benefit of this enactment? The 48th section provided, that if the company should be reduced to less than seven members, the members who, knowing that fact, continued to carry on the business, should be "severally liable to the payment of the whole of the debts of the company contracted during such time." The 74th section referred in substance to the 38th, when it declared the meaning of "contributory" to be, "every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up." The 82nd section allowed applications for winding-up to be made by any creditor or any contributory. All these provisions shewed the intention of the Legislature to be, that every person on the list of members of the company must be treated as a contributory liable to bear his share in satisfying the debts of the company, and proved that though the right of the creditor to get payment was to be enforced against the company, it was, through the company, to be enforced against every individual person who, as a member, had joined in carrying on the trade of the company.

The cases decided on the general law, independently of the statute, do not weaken the rights of the creditors. The case of *The Western Bank of Scotland* v. *Addie* (1), justifies the judgment of the Court below. In *Clarke* v. *Dickson* (2) Lord *Campbell* declared that a contract made on fraudulent representations was not void, but voidable, and that the only remedy of the person defrauded was by an action of deceit. And that decision had since been sustained in other Courts. He must submit to the consequences of his contract; he must take his remedy against those who misled him into making it. Lord *Campbell* repeated that opinion in

(1) Law Rep. 1 H. L. Sc. 145.

(2) E. B. & E. 148.

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Mixer's Case (1), and his opinion was adopted in this House in *The Western Bank of Scotland* v. *Addie* (2).

Many of the propositions contended for on the other side might be admitted, but they would not affect this case. *Huguenin* v. *Basely* (3) merely decided that persons claiming as volunteers under one who had obtained a benefit by fraud, could not enforce that benefit against the person defrauded. So, in *Smith* v. *The Reese River Mining Company* (4), and in *The Venezuela Company* v. *Kisch* (5), the contract made was not *ad idem* with that which was applied for, and the claim for relief was against the company, and before any order for winding up. In like manner, in *Ship's Case* (6), and in *Stewart's Case* (7), there was no contract. The same was the case in *Kennedy* v. *The Panama Railway Company*, recently decided (8). But in *Chapman and Barker's Case* (9), the party having been put on the register with his own assent, was held liable as a contributory to the claims of the creditors, though he might have a right to indemnity as against the company (10). The contract being not void, but voidable, the question is, whether that means void till affirmed, or valid till disaffirmed. It must be the latter: *Kingsford* v. *Merry* (11); *Pease* v. *Gloahec* (12). Then when must it be disaffirmed. The party seeking to avoid it must do so when he has the power to exercise such a right. He must exercise the right in due time: *White* v. *Garden* (13); *Deposit Life Assurance Company* v. *Ayscough* (14). Even then it will not have the effect of relating back to past transactions: *Stevenson* v. *Newnham* (15).

If a man thinks he has been deceived into joining a company, he cannot be relieved unless he proceeds for that purpose within a reasonable time: *Wilkinson's Case* (16); *Lawrence's Case* (17). Eighteen months were, in the first of these cases, held not to constitute a reasonable time. Nor will a much shorter time be reasonable when there is a better opportunity of knowing the facts than existed in that case, which related to a bank established at *Madrid*. Here *Oakes* took the chance of profit, and not till he found that chance gone by, and the company a failure, did he repudiate the shares. *Elkington's Case* (1) shews, that under such circumstances he is not entitled to relief. The contract here was executed, and the cases of *Burnes* v. *Pennell* (2), *The National Exchange Company* v. *Drew* (3), and *New Brunswick Company* v. *Conybeare* (4), all shew, that to set aside such a contract a case of fraud must be distinctly proved as against the company, or those who represent the company. There is no such proof here. This last case is a strong authority for the Respondents, and it becomes more so as applied to the facts of the present case, if one word of Lord *Chelmsford's* judgment in it is altered. His Lordship speaks of an important " fact not misrepresented, but *concealed*." The expression " not communicated," would more exactly have applied to the circumstances there and here. [THE LORD CHANCELLOR agreed to the correction as to that case.]

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(1) 4 De G. & J. 575.

(2) Law Rep. 1 H. L. Sc. 145.

(3) 14 Ves. 273.

(4) Law Rep. 2 Eq. 264, 12 Jur. N.S. 616.

(5) 3 De G. J. & S. 122 (a) Law Rep. 2 H. L. 99.

(6) 2 De G. J. & S. 544; 11 Jur. N.S. 331,

(7) Law Rep. 1 Ch. Ap. 574, 12 Jur. N.S. 785

(8) Weekly Notes, 6 July, p. 209. L.R. 2 Q.B. 580.

(9) Law Rep. 3 Eq. 361.

(10) See *Bargate* v. *Shortridge*, 5 H. L. C. 297.

(11) 1 H. & N. 503; 3 Jur. N.S. 68

(12) Law Rep. 1 P. C. 219, 12 Jur. N.S. 67

(13) 10 C. B. 919.

(14) 6 E. & B. 761; 2 Jur. N.S. 812.

(15) 13 C. B. 285, 302.

(16) Law Rep. 2 Ch. Ap. 536.

(17) Law Rep. 2 Ch. Ap. 412.

(a) 11 Jur. N.S. 646.

As to Mr. *Peek*, it is clear from *Nicol's Case* (5), *Duranty's Case* (6), and *Ex parte Worth* (7), that all the objections which apply to Mr. *Oakes's* claim to relief, apply with even greater force to that of Mr. *Peek*. No false representations were made to him by the party with whom he contracted—the person from whom he purchased the shares.

As to the registration of the company. The certificate of registration is a conclusive answer to the objections now taken. Under the 7 & 8 Vict. c. 110, the certificate was held effectually to incorporate a company, although the deed registered was a defective deed: *The Barwen Iron Company* v. *Barnett* (8). In *Bird's Case* (9) it was held, expressly adopting the previous case, that the certificate of the registrar was, under the same statute, evidence of complete registration, although all the requisite provisions might not have been fully complied with. The alteration proposed by the registrar, and agreed to by the attesting witness, without the

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(1) Law Rep. 2 Ch. Ap. 511.
(2) 2 H. L. C. 497.
(3) 2 Macq. Sc. Ap. 103.
(4) 9 H. L. C. 711-742; 8 Jur N.S. 575.
(5) 3 De G. & J. 387; 5 Jur NS 206.
(6) 26 Beav. 268; 4 Jur NS 1068
(7) 4 Drew. 529; 5 Jur NS 504
(8) 8 C. B. 406.
(9) 1 Sim. (N.S.) 47.

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concurrence of the subscribers, is said to vitiate the deed, and *Pigot's Case* (1), was referred to. But that case, though it lays down the general proposition, that the alteration of a deed by strangers, and in a material part, will vitiate the deed, does not define the circumstances under which the alteration shall have that effect. Later cases have better explained that matter, and shew that the true ground of objection is, that the alteration has been made in the interest of the party making it: *Henfree* v. *Bromley* (2); *French* v. *Patton* (3); *Taylor* on Evidence (4); *Smith's* Leading Cases (5).

Then as to the order for winding up. The Court has power, under the 79th section of 25 & 26 Vict. c. 89, to make a compulsory order "whenever the company is unable to pay its debts," or "the Court is of opinion that it is just and equitable that the company should be wound up." The notice was sufficient, and the resolution adopted at the meeting was in conformity with it. The addition did not vitiate the resolution at the meeting; but even if it had done so, the Court had the power to direct the winding up of the company.

Mr. *Giffard* replied.

15 Aug. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, these are appeals from orders of Vice-Chancellor *Malins*, refusing to remove the names of the Appellants from the register of members of the company of *Overend, Gurney, & Co., Limited*, and from the list of contributories of the said company, and to rectify the register accordingly. The cases are of the greatest importance, and the decision of this House upon them will determine for the future the rights and liabilities of creditors and shareholders of a limited liability company upon its winding up under the *Companies Act*, 1862.

The Appellants dispute their liability to be placed upon the list of contributories, on the ground that they were induced to take shares in the company by false and fraudulent representations made by the directors in a prospectus issued by them on its for-

(1) 11 Co. Rep. 26. (2) 6 East, 310. (3) 9 East, 351.
(4) ss. 1617-18. (5) Ed. by Maude and Ch. 796, 831.

mation; that, consequently, their agreements to become shareholders in the company are not binding upon them, and that they never, by any subsequent act, affirmed them or acquiesced in their validity. The Appellant *Oakes* was an original allottee of his shares; the Appellant *Peek* purchased his in the market, either from an allottee, or from a purchaser from an allottee. In considering the case, I shall look at it throughout as if *Oakes* was the only Appellant, because if he fails to establish his right to be relieved from liability, *Peek* cannot possibly succeed.

The prospectus of the company was dated on the 12th of July, 1865. *Oakes*, on the 15th of July, applied for 100 shares, but twenty-five only were allotted to him. There can be no doubt that *Oakes* was induced by the prospectus to take his shares; and, therefore, the first question to be considered is, whether, as he alleges, the representations it contained were false and fraudulent.

The company was formed, as the prospectus states, "for the purpose of carrying into effect an arrangement for the purchase, from *Overend, Gurney, & Co.*, of their long-established business of bill brokers and money dealers." In order to form an opinion of the true character of the statements made in the prospectus, it is necessary to know what was the state of the firm of *Overend, Gurney, & Co.*, at the time when it was proposed to convert their partnership into a joint stock company. At this period they stood high in the commercial world. Their dealings and transactions were known to be of a most extensive description, and they were supposed to be carrying on their business upon a safe and sure basis. But it appears from the affirmation of Mr. *John Henry Gurney*, one of the firm, that, for some time before, the partners managing the business had been making considerable advances of an exceptional character to various parties and companies, upon securities of a speculative and uncertain nature, and that, "on a close examination which was undertaken prior to the transfer of the business to the company of '*Overend, Gurney, & Co., Limited*,' it was found that the doubtful advances amounted to £4,199,000, of which sum it was estimated that £1,082,000 only would be realized, leaving the sum of £3,117,000 to be provided."

From the same source of information we learn, that from the year 1860 the total result of all the operations of the firm had

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been a loss of about £500,000 a year. Mr. *Gurney* described the business carried on by *Overend, Gurney, & Co.* as having been of an exceedingly extensive and profitable nature, and stated that for the five years ending on the 31st December, 1860, after allowing interest upon capital, and upon the balances to the credit of the partners, the profits divided amongst the several partners averaged upwards of £190,000 per annum; but that, subsequent to that period, the actual net profits had not been ascertained or appropriated, but were reserved to meet the losses consequent upon the exceptional business before mentioned. From this statement it might be supposed that a different course was adopted with respect to the profits of the business after 1860 from that which had been pursued previously. But upon the cross-examination of Mr. *Gurney* he proved, that in 1855, and every succeeding year down to 1860, portions of the balances had always been employed in writing off losses.

Such was the condition of the partnership of *Overend, Gurney, & Co.*, at the time when it was proposed to turn it into a joint stock company.

The partners in the firm, who were to become directors of the new company, were, of course, acquainted with all these particulars, and the other persons, whose names appear on the prospectus as directors, must have been fully informed of them.

Under these circumstances the prospectus, which the Appellant alleges to be false and fraudulent, was issued. It is headed, in very large characters, with a name likely to attract attention and inspire confidence, "*Overend, Gurney, & Co., Limited,*" and describes the intended capital of the company to be £5,000,000, in 100,000 shares of £50 each, of which it is said it is not intended to call up more than £15 per share. After describing the purpose for which the company was formed, the prospectus proceeds: "the consideration for the goodwill being £500,000, one-half being paid in cash and the remainder in shares in the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders."

4 Ch 711.

It is said that everything which is stated in the prospectus is literally true, and so it is. But the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most

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4 Ch 721

material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood. If the real circumstances of the firm of *Overend, Gurney, & Co.* had been disclosed, it is not very probable that any company founded upon it would have been formed. Indeed, it was admitted in the course of the argument that if the true position of the affairs of *Overend, Gurney, & Co.* had been published it would have entailed the ruin of the old firm, and would have been utterly prohibitory of the formation of the new. To which the only answer which fairly suggests itself is, "Then no company ought ever to have been attempted, because it was only possible to entice persons to become shareholders by improper concealment of facts."

From the memorandum and articles of association and deed of covenant in relation to the business, to which applicants for shares were referred in the prospectus, nothing unfavourable to the prospects of the new company could be gathered. But from a deed of arrangement contemporaneous with the deed of covenant, the existence of which was not made known in the prospectus, the real conditions of the transfer of the business of *Overend, Gurney, & Co.* appear. It is true the prospectus states that the vendors guaranteed the company against any loss on the assets and liabilities transferred, which, it is said, was sufficient to inform, or, at least, to caution, persons disposed to take shares that there might be unsatisfied liabilities of *Overend, Gurney, & Co.* to be provided for. But without dwelling on the postponement of the full effect of the guarantie for three years by the private deed of arrangement, the statement that £500,000 were given as the consideration for the goodwill was calculated not merely to lull suspicion as to the state of the affairs of *Overend, Gurney, & Co.*, but to attract persons to join the proposed company. No one can for a moment suppose that if it had been possible to take the goodwill of *Overend, Gurney, & Co.'s* business into the market with a disclosure of all the circumstances attending the business, it would have realized a single shilling; but the parties, some of whom were both vendors and purchasers, arranged amongst themselves for the payment of a sum for this unmarketable goodwill, the half of which must have come out of the moneys of the shareholders.

It is said that the directors believed *bonâ fide* that the company would be a profitable concern, and upon the strength of that opinion they themselves took shares, and never parted with those shares, although at one time they were at a premium.

With respect to this proof of the sincerity of their belief, it must be observed that they were each of them compelled to possess 200 shares as the qualification of a director under the articles of association. I entertain no doubt, however, that the directors were honestly and sincerely of opinion that if they could procure additional capital, and could carry on some of the business of *Overend, Gurney, & Co.* on a healthier system, the company would succeed. But as the experiment was to be made with other people's money as well as with their own, I think they were bound to furnish to others the information which they possessed themselves, and so enable others to form a competent judgment as to the prudence of embarking in the new concern.

If this had been a case between *Oakes* and the company, in which he sought to be relieved from his contract, as in *Venezuela Railway Company* v. *Kisch* (1), or the company had been suing him for calls, as in *The Bwlch-y-Plwm Lead Mining Company* v. *Baynes* (2), he would have succeeded in the one case, and the company would have failed in the other, on the ground—which, I venture to think, was correctly laid down in the recent case of *The Western Bank of Scotland* v. *Addie* (3) in this House—that "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations" (and I would here add, "by fraudulent concealment") "of the directors, and the directors seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent."

It is quite clear, therefore, that *Oakes* might originally have disaffirmed that contract, and divested himself of his shares, and that he never did any act to affirm it, nor was aware of the true state of the firm of *Overend, Gurney, & Co.* at the time of the

(1) Law Rep. 2 H. L. 99.
(2) Law Rep. 2 Ex. 324.
(3) Law Rep. 1 H. L Sc. 145.

formation of the new company, nor until after the failure. No dividend was paid to the shareholders, and no general meeting was called, the articles of association prescribing that the first general meeting should be held not more than twelve, nor less than ten months from the day of incorporation, and the company having come to an end before the twelve or even the ten months had expired.

Such was the position of *Oakes* when the order for winding up the company was made on the 22nd of June, 1866. His name being upon the register of shareholders, was placed (as a matter of course) by the liquidators upon the list of contributories. A motion was made before Vice-Chancellor *Malins* to remove his name from the list, when His Honour refused to make any order, and from that refusal the present appeal is brought.

The question, as I have already said, is one of the highest importance, involving present pecuniary interests to an enormous extent, and calling for a final decision upon the relation to each other of creditors and shareholders of limited companies in every case of a winding-up under the *Companies Act*, 1862.

On the part of the creditors, it is said that every person whose name is found upon the register at the time when the order for winding up is made is a shareholder, and liable to contribute towards the payment of the debts of the company to the extent of the sums due upon his shares, unless he can prove that his name was put upon the register without his consent.

On the part of the shareholders it is contended that a person who has been induced by fraud to enter into a contract to take shares, and whose name is afterwards placed upon the register, never becomes a shareholder, because his agreement, being obtained by fraud, is of no validity. In support of this proposition, the words of my noble and learned friend (Lord *Cranworth*) in *The Venezuela Railway Company* v. *Kisch* (1), were cited, where he said "The case of the Respondent is, that he never was a member, for that he was induced to take shares by fraudulent representations, which entitle him to repudiate and treat as null all which he was induced to do." My noble and learned friend never meant to deny the distinction between void and voidable contracts, or to say that

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(1) Law Rep. 2 H. L. 99, 123.

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an agreement obtained by fraud is in no case any agreement at all. His language must be understood in its application to the case before him, in which the Respondent seeking relief from the contract into which he had been drawn by fraud, was entitled, if he chose to repudiate it, to treat it as null and void *ab initio*, and therefore to say that he never was a member.

The distinction between void and voidable contracts is one which will be found very necessary to be borne in mind when we come to consider the words of the *Companies Act*, 1862, upon which the question of *Oakes's* liability will ultimately turn. It is a settled rule of law, as Mr. Justice *Crompton* said, in *Clarke* v. *Dickson* (1): "that a contract induced by fraud is not void, but voidable only at the option of the party defrauded." If it were otherwise, if a contract induced by fraud were void, there would be an end of the question in this case, because a contract void in itself can have no valid beginning, and *Oakes* never would have become a shareholder of the company.

Before considering the provisions of the *Companies Act*, 1862, it will be necessary to advert to some of the previous Acts in *pari materiâ*, because it was pressed upon us in argument that, whatever may have been the decisions under former Acts, they are inapplicable to the case of companies with limited liability. A distinction between the *Companies Act*, 1862, and former Acts was suggested by Lord *Cairns* in the case of *The Reese River Mining Company, Ex parte J. Smith* (2), where His Lordship says: "There is, with regard to companies established under the Act of 1862, no contract whatever between a creditor and a shareholder in the company. The contract is between the creditor and the company, and when the Legislature introduced the principle of limited liability, it was absolutely necessary to give effect to that principle by setting up the company, and the company alone, as that with which creditors, or third persons, could contract."

The first Act, however, which enabled joint stock companies to limit their liability is the 18 & 19 Vict. c. 133 (1855), and that Act, by the 7th section, gave the same remedy, by execution against the shareholders, to the extent of the unpaid portions of their shares in the capital of the company, as creditors could use

(1) E. B. & E. 148.

(2) Law Rep. 2 Eq. 264. 12 Jur NS 61

against shareholders of companies with unlimited liability, under the former Acts of 1844, 1848, and 1849.

The first Act which enabled a creditor to become a party to the winding-up of a company, whether with limited or unlimited liability, was the 19 & 20 Vict. c. 47, s. 69, and by the 61st section of this Act, in the event of a company being wound up, the existing shareholders were to be liable to contribute to the assets of the company to an amount sufficient to pay the debts of the company, and the costs, charges, and expenses of winding up the same, with this qualification, that if the company was limited no contribution should be required from any shareholder exceeding the amount (if any) unpaid on the shares held by him. This Act was followed by the 20 & 21 Vict. c. 77, which, by the 1st section, enacted that 81 where an order was made for the winding-up of a company the Judge, in all cases in which it appeared expedient, and for the benefit of all parties interested, might call upon the creditors to appoint a person to represent them, and after the appointment of such representative the creditors were to be deemed parties to the winding-up.

These, and the subsequent Act of the 21 & 22 Vict. c. 60, contained all the provisions with respect to the rights of creditors against shareholders prior to the *Companies Act*, 1862. As I understand these Acts, they merely changed the remedy which the creditor previously possessed of issuing execution against the shareholder (which, as I have shewn, was continued to him when companies with limited liability were first established), into a right to obtain satisfaction of his debt by means of forced contributions, either by compelling a winding up of the company, or by becoming a party to a winding-up which had been already ordered. They do not appear to me to have changed the right of the creditor on the one hand, or the liability of the shareholder on the other; and therefore, I cannot adopt the argument of the counsel for the Appellant, that the cases which were decided upon the Acts prior to 1856 must be considered as inapplicable.

5 H.L. 35.
12 Eq. 4

The case of *Henderson* v. *The Royal British Bank* (1), upon which, in his judgment, the Vice-Chancellor *Malins* placed great reliance, seems to me, unless the law has been altered by the

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(1) 7 E. & B. 356; 3 Jur N.S. 1111, 112

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Companies Act, 1862, to be an authority of great weight against the Appellant. Lord *Campbell*, in describing the attempt of a shareholder to relieve himself from liability under similar circumstances to those in which the Appellant is placed, expressed his opinion in the strongest language. He said: "It would be monstrous to say, he having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it on the faith that he was a shareholder." The decision in this case was considered so satisfactory that it was followed by the Court of Common Pleas in *Dossett* v. *Harding* (1), and by the Court of Exchequer in *Daniell* v. *The Official Manager of the Royal British Bank* (2), without anything more being said in either Court than an expression of acquiescence in the judgment.

The case of *Henderson* v. *The Royal British Bank*, being supported by such a weight of authority, will materially influence my opinion upon the present case, unless I can be satisfied that the *Companies Act*, 1862, has placed creditor and shareholders in a different relation to each other than that in which they previously stood.

I have shewn that if it was necessary to give effect to the principle of limited liability by setting up the company alone as that with which third persons could contract, this was done the very year after companies with limited liability were established, by taking away the *scire facias* of creditors, and enabling them to intervene in the winding up of a company. This power of petitioning for the winding up of a company was not first conferred upon, but merely continued to, creditors by the 82nd section of the Act of 1862.

The real question in this appeal is, whether the *Companies Act* of 1862 has placed a shareholder on such a different footing from that in which he stood at the time of the decision in *Henderson* v. *The Royal British Bank*, that his name being upon the register when the order for winding up was made, it is competent to him to defend himself against his *primâ facie* liability to contribute, by alleging and proving that he was induced by fraud to become a shareholder. There are very few sections of the Act which it will be necessary to consider.

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(1) 1 C. B. (N.S.) 524; *Powis* v. *Harding*, Ibid. 533.
3 Jur. N.S. 1138 3 Jur. N.S. 1149

(2) 1 H. & N. 681. 3 Jur. N

By the 18th section, upon the registration of the memorandum of association and of the articles of association, the registrar shall certify that the company is incorporated, and, in the case of a limited company, that the company is limited, the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate, &c., but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned.

The 38th section is here referred to, which, amongst the qualifications of the liabilities of contributories, provides that, in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member.

By the 23rd section, every person who has agreed to become a member of the company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

And by sect. 74, the term "contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up.

The result of these provisions of the Act is, that a contributory is a person who has agreed to become a member of the company, and whose name is upon the register.

Did the Appellant then agree to become a member? His counsel answer this question in the negative; because they say that a person who is induced by fraud to enter into an agreement cannot be said to have agreed; the word "agreed" meaning having entered into a binding agreement. But this is a fallacy. The consent which binds the will and constitutes the agreement is totally different from the motive and inducement which led to the consent. An agreement induced by fraud is certainly, in one sense, not a binding agreement, as it is entirely at the

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option of the person defrauded whether he will be bound by it or not. In the present case, if the company formed on the basis of the partnership of *Overend, Gurney, & Co.*, had realized the expectations held out by the prospectus, the Appellant would probably have retained his shares, as he would have had an undoubted right to do. But when the order for winding up came, and found him with the shares in his possession, and his name upon the register, the agreement was a subsisting one. How could it then be said that he was not a person who had agreed to become a member? To hold otherwise would be to disregard the long and well-established distinction between void and voidable contracts.

It was said by the counsel for the Appellant that the *Companies Act*, 1862, was to be regarded merely as adjusting the rights of the shareholders *inter se*, and that, as the liquidators represented the company, the liability of the Appellant must be determined as between himself and the company, and not as respects creditors with whom he never contracted. It is true that there was no contract between the creditor and the shareholders, and that the creditor probably never thought of the shareholders in his dealings with the company. But he must be taken to have known what his rights were under the Act, and that he had the security of all the persons whose names were to be found upon the register, and who had agreed to become shareholders. The liability of the shareholders is not under a contract with the creditors, but it is a statutable liability under which the creditors have a right which attaches upon the shareholders to compel them to contribute to the extent of their shares towards the payment of the debts of the company.

It is not the mere fact of the name appearing upon the register which makes a person liable as a member of the company. If he has not agreed to become a member he cannot be made a contributory. This was the ground of decision in some of the cases which were cited to shew that the order for winding up did not preclude the Appellant from disputing his liability. As Vice-Chancellor *Wood* said, in *Chapman and Barker's Case* (1): "If the mere placing the name upon the register, rightly or wrongly, is to give the creditors a right to proceed against the individual, any one of us now in this Court might find himself upon the register of some company, and liable to its creditors. It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder."

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(1) Law Rep. 3 Eq. 365.

The want of consent was the ground on which *Ship's Case* (1) was decided. There the prospectus of a proposed company, described as a finance bank, stated several objects, some of which went beyond ordinary banking business. *Ship*, on the footing of the prospectus, applied, in May, 1864, for shares, and paid a deposit. On the 1st of June the company was registered, with a memorandum of association defining its objects, which went considerably beyond the objects mentioned in the prospectus, and on the same day the directors sent *Ship* a letter of allotment of his shares. In the December following the company failed. Upon an application by *Ship* to have his name removed from the register, on the ground that he never had agreed to become a shareholder in the company with these extended objects, and upon his oath that he never had notice of the extension of the objects of the company beyond those named in the prospectus, Vice-Chancellor *Wood* removed his name from the register, and his decision was afterwards affirmed by the Lords Justices. This case was followed by *Webster's Case* (2) and by *Stewart's Case* (3) both of which related to the same company, the *Russian (Vyksounsky) Ironworks Company*, where the objects of the company, as stated in the memorandum and articles of association, were more extensive than those stated in the prospectus, and in both of which cases the parties who were induced by the prospectus to become shareholders were removed from the list of contributories.

I confess that these decisions are not at all satisfactory to my mind. I think that persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established. If they fail to do so, and the objects of the company are extended beyond those described in the prospectus (a fact which may be easily ascertained), the persons who have so taken

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(1) 2 De G. J. & S. 544; 11 Jur. N.S. 331 (2) Law Rep. 2 Eq. 741.
(3) Law Rep. 1 Ch. 574; 12 Jur. N.S. 755.

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shares on the faith of the prospectus ought, in my opinion, to be held to be bound by acquiescence. In *Ship's Case* the Judges partly proceeded on the oath of the party that he never had notice of the extension of the objects of the company. However true this may be, it depends entirely upon the party's own assertion; and the answer to it is, "You might have made yourself acquainted with the proceedings of the company, and ought to have done so." Accordingly, in subsequent cases connected with the *Russian Iron Company, Lawrence's Case* (1), and *Kincaid's Case* (2), and in *Wilkinson's Case, In re Madrid Bank* (3), in which last case also there was a material variance between the prospectus and the memorandum of association, it was held that persons were bound, within a reasonable time after the allotment of shares, to inform themselves of the nature of the documents of title under which they and the company were proceeding to carry on trade, and in all these cases the parties were retained on the list of contributories.

5 Eq 255
L 263
3 H 4 259
6 P.C. 357.

In a still later case, that of *Ex parte Peel, In re Barned's Banking Company* (4), Lord *Cairns* expressed an opinion on the subject to which I entirely subscribe. He said: "It is the bounden duty of a person to ascertain, at the earliest practicable moment, what is the charter or title deed under which the company in which he has agreed to become a shareholder is carrying on business. I think he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But even when the memorandum and articles of association are not in existence at the time, I think, at the very latest, when he receives his allotment of shares he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection." This appears to me to lay down a clear and precise rule, which will render unnecessary the consideration in each case whether a reasonable time has or has not elapsed from which acquiescence may be assumed, a question which has occasioned some variety, and apparent, if not actual, discrepancy in the decisions.

7 Ch 161

These views, thus expressed by Lord *Cairns*, in some degree apply to the case of the *Reese River Silver Mining Company* (5), which appears to me not to have been well decided upon another ground. There is no doubt that *Smith* had been led to take shares in the company by the false representations of the flourishing condition of the mines contained in the prospectus. When the order for winding up the company was made, his name was upon the register. It is true that he had filed his bill against the company to be relieved of his shares, but he still held them, and the winding-up order found him in the condition of a person who had agreed to become a member, and whose name was upon the register, and who, therefore, exactly answered the description of a contributory contained in the *Companies Act*, 1862.

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(1) Law Rep. 2 Ch. 412. (2) Law Rep. 2 Ch. 426. (3) Law Rep. 2 Ch. 536.
(4) Not reported. (5) Law Rep. 2 Eq. 264.

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In the conclusion at which I have arrived in this case I rely altogether upon the words of the Act. I do not take into consideration the principle which has governed many decisions, as to which of two innocent persons is to suffer; but I cannot help remarking upon the singular state of things which would result from relieving the Appellant from his liability. The same right of relief established by him would belong to all the allottees of shares who had retained them in their possession; and in the winding up of this company the only contributories to the debts of the company would be the directors and those unfortunate shareholders who had purchased their shares in the market. So that although the shareholders who had suffered by the fraud of the directors might recover from them the full amount of the damages sustained, the creditors could only make the directors of this limited liability company contribute towards payment of their debts to the extent of their shares.

Upon the principal and important question in this case I entirely agree with the decision of Vice-Chancellor *Malins.*

But after His Honour had given judgment in this case, and even after his decree was enrolled, the Appellants made a fresh motion to have their names removed from the list of contributories upon grounds which were clearly open to them upon the original motion.

Two of them, indeed, are preliminary objections, which, if well founded, would have superseded all farther argument. For if there was no valid winding-up order, and no liquidators were duly appointed, there could be no list of contributories upon which the Appellant's names could be placed, and the whole of the proceed-

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ings must have fallen to the ground. The Vice-Chancellor, therefore, rightly refused to entertain the motion; but as the objections have been argued before your Lordships, it will be proper to consider them.

The first of them strikes at the root of the company's existence, for it asserts that there was no memorandum of association subscribed by seven persons, and, consequently, that there never was any incorporated company. This, as I understand, is founded upon an alleged variance between the prospectus and the memorandum of association, which is made the ground of a separate objection. The short answer to this objection is found in the *Companies Act*, 1862, which, in the 6th section, provides that any seven or more persons may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the Act in respect of registration, form an incorporated company. And, by the 18th section, upon the registration of the memorandum of association, &c., the registrar shall certify under his hand that the company is incorporated, and a certificate of the incorporation of the company given by the registrar shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with. I think the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case, that all previous requisites had been complied with.

The next objection to be considered is, that the official liquidators were not duly appointed. The ground of this objection is, that in the case of a voluntary winding-up, the appointment of liquidators can be made only at an extraordinary general meeting, the notice of which must specify the objects for which it is called, and that the notice issued by the directors omitted all mention of the intention to appoint liquidators. That notice, which was intituled "In the Matter of the *Companies Act*, 1862, as well as of *Overend, Gurney, & Co., Limited*," stated that the meeting would be held "to consider the position of the affairs of the company, and, if deemed expedient, to pass the following resolution: 'That the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same voluntarily.'"

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20 Eq 364-6

The 133rd section of the *Companies Act*, 1862 (under which the notice was given), enacts that certain consequences shall ensue upon the voluntary winding up of a company, and amongst them that "liquidators shall be appointed for the purpose of winding up the affairs of the company, and distributing the property." The necessary consequence of a voluntary winding-up being the appointment of liquidators, I am disposed to think that they may be appointed at the same general meeting at which the resolution for voluntarily winding up is passed, without special notice.

But if it is doubtful whether liquidators were duly appointed at the extraordinary general meeting of the company, I think the Respondents may rely upon the appointments made by the orders of Vice-Chancellor *Kindersley.*

On the 11th of May, 1866, the Vice-Chancellor made an order, under the 85th section of the *Companies Act,* 1862, appointing, provisionally, Messrs. *Turquand & Harding,* to be the official liquidators of the estate and effects of the company. At the extraordinary general meeting, held on the 11th of June, 1866, it was resolved that the same two gentlemen should be appointed liquidators. If this was not a valid appointment, then as by the 141st section of the Act, "if from any cause whatever there is no liquidator acting in the case of a voluntary winding-up, the Court may, on the application of a contributory, appoint a liquidator or liquidators;" it was competent to Vice-Chancellor *Kindersley* to make an appointment. This he did by his order of the 22nd of June, 1866, for although that order is in terms "that *Turquand* and *Harding* be continued liquidators," it would be mere trifling to hold that, if necessary, it may not be held to be an original appointment.

The last objection is founded upon an alleged variance between the prospectus and the memorandum of association. It is said by the Appellant, that the proposal in the prospectus is limited to carrying on the business of *Overend, Gurney, & Co.;* but that the memorandum of the association extends to "the acquisition, whether by way of purchase, or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms as the directors shall think expedient." And he contends, upon the authority of *Ship's Case,* that this variance releases him from the obligation of his contract. His excuse for not bringing this forward upon the original argument is, that until the first order of Vice-Chancellor *Malins*, made on the 9th of February, 1867, he believed that the memorandum and articles of association of the company were strictly confined to the company mentioned in the prospectus. But although the Appellant might have remained ignorant of the variance between the prospectus and the memorandum of association until the time that he mentions, it must have been previously known to his solicitor, and the memorandum of association is actually made an exhibit to an affidavit sworn by the Appellant's accountant on the 2nd of November, 1866. There is, therefore, no excuse for keeping back this objection at the time of the original hearing.

But the cases which have been mentioned in the course of my observations upon the principal question in this case will satisfy your Lordships that this objection ought not to prevail. There may be some doubt whether the terms of the memorandum of association are such a departure from the object put forward in the prospectus as to constitute a different company. But be that as it may, the Appellant had an opportunity during ten months of inspecting the memorandum of association, of which he was bound to avail himself; and his voluntary ignorance upon the subject until the winding-up order came precludes him from raising the objection.

It only remains to observe that all that has been said with respect to *Oakes* applies with greater force to *Peek*, even if his situation as a purchaser of shares in the market did not preclude him from most of the objections which have been raised in *Oakes*'s *Case*.

In my opinion, my Lords, the decree of the Vice-Chancellor ought to be affirmed, but with a variation as to the costs, which must be borne by each of the Appellants in respect of his own case. I submit to your Lordships that these appeals ought to be dismissed with costs.

LORD CRANWORTH:—

My Lords, the Appellant, Mr. *Oakes*, in order to sustain his appeal, must make out two propositions. He must satisfy the

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House, first, that he was induced to take his shares in *Overend, Gurney, & Co., Limited*, by the fraud of the company, or of those for whom the company became responsible; and, secondly, if that is made out, that he ought not to be retained on the list of contributories. The first question is one of fact, and its determination, however important to the parties concerned, is of no general interest. The other question is of very extensive consequence in the mercantile world. It is of the utmost importance that persons dealing with joint stock companies should be in no doubt as to who are the persons to whom they are entitled to look as liable to perform the obligations and pay the debts of the partnership.

I shall proceed at once to consider this second question—to determine what are the relative rights of Mr. *Oakes* and the creditors, and for this purpose shall assume it to be true that he was induced to take shares by the fraud of the company, or of those for whom the company became responsible. There is no doubt that the direct remedy of a creditor is solely against the incorporated company. He has no dealing with any individual shareholder, and if he is driven to bring an action to enforce any right he may have acquired, he must sue the company, and not any of the members of whom it is composed. This being so, the argument of the Appellant is, that it is only to the assets of the company that the creditor can resort, and so that the only question is, of what those assets consist. This question, he contends, so far as the assets consist of money to be recovered by legal process against other persons, whether shareholders or not, can only be solved by ascertaining what rights the company has against those other persons. If in any proceeding by the company instituted for the purpose of recovering money from any person, that person has a valid defence, whether legal or equitable, the Appellant contends that the sum claimed from him does not form part of the assets of the company. These assets, he says, consist solely of property in the actual possession of the company, or which the company can recover by means of legal proceedings. In this case the Appellant contends that he was induced to become a shareholder by means of a fraud which entitles him to repudiate the status of shareholder, and to say, as between himself and the company, that he never held a share. And if he can say this against the company, then

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the Appellant contends he can say it against all the world, for his liability is a liability to the company and to no one else.

But it must be borne in mind that a company formed under the statutes of 1862 is not a mere common law corporation; its rights and liabilities depend, in great measure, on statutable provisions; and in order fully to understand and interpret them we must consider not merely the enactments of the *Companies Act*, 1862, under which the firm of *Overend, Gurney, & Co., Limited*, was incorporated, but also the other Acts previously passed in *pari materia*. When it became the habit and interest of persons engaged in commerce to unite in great numbers for carrying on any particular trade, it soon became evident that the ordinary provisions of the laws of this country were ill adapted to the business of such bodies. It is a general principle of mercantile law that when two or more persons are associated in partnership for carrying on a trade every partner can bind his co-partners in all contracts made in the ordinary course of the business. But where a hundred persons or upwards are engaged in any particular trade to be managed by directors acting for the whole body, that principle plainly became very inconvenient in its application. So, again, it was a principle of our Courts that in any proceeding by or against a partnership, all the partners must either, as Plaintiffs or Defendants, be made parties to the proceeding. But when numerous members of a partnership, to the extent of many hundreds of persons, were concerned as partners, this rule would, if adhered to, have made litigation practically impossible, and would often have amounted to a denial of justice.

To meet these and many other difficulties arising from the same or similar causes, the Legislature has from time to time interfered, the last general Act on the subject being the *Companies Act*, 1862, under which *Overend, Gurney, & Co.*, became incorporated. I have already observed, that in order to understand the true effect of that statute it is necessary to consider some of those which preceded it. The first general statute to which I need refer is the *Banking Act*, 7 Geo. 4, c. 46. Before the passing of that Act it was not lawful for more than six persons to be united together as partners in carrying on the business of bankers. This restriction was removed by that statute as to banking partnerships carrying on business at a distance of more than sixty-five miles from *London*. The Act provides that the company shall file annually at the Stamp Office a list of all the partners, open to general inspection. And in order to make it possible for such companies, the number of whose partners was unlimited, to maintain and defend suits instituted by and against them, they were bound to appoint a public officer, who, in all disputes between the company and third persons, should represent the company—an officer by whom the company might sue and be sued. Any creditor, or other person, having a demand on the company might proceed against the public officer, and on recovering judgment against him might issue execution against any member of the company, or any person who had ceased for not more than three years to be a member, but who was a member when the contract recovered on was entered into. Companies trading under the provisions of this Act were not incorporated. They were mere associations of individuals trading in partnership, but with several important statutable incidents connected with them. This Act was confined to banking partnerships. No general Act relating to partnerships in any other business was passed until the year 1844, although numerous private Acts had before that time been obtained by persons engaged in speculations requiring capital beyond what could be supplied from private resources, incorporating them, and introducing regulations for the benefit of creditors and other persons dealing with them.

In 1844 the Legislature passed the 7 & 8 Vict. c. 110, being the first general joint stock company Act. The provisions of that Act material for the question now before us, were as follows:—It was declared to apply, with some exceptions, to all companies the capital of which was divided into shares transferable without the consent of all the other shareholders. The persons intending to become shareholders were obliged to execute a deed stating the nature and particulars of the proposed business. A public office was appointed for keeping a register of, amongst other things, the name of every projected company; a statement of the nature of its intended business; the amount of its capital, and the names and addresses of every subscriber, with the number of the shares to be taken by him. The persons intending to form themselves into a company were obliged to furnish to the registrar these particulars, with many others to which I do not feel it necessary to advert, and on its being certified that this had been done, it is enacted that the shareholders shall be thenceforth incorporated for the purpose of carrying on the business mentioned in the deed, and shall so continue until it is dissolved and its affairs are wound up, but so, nevertheless, as not to restrict the liability of any shareholder under a judgment recovered against the company, it being expressly declared that every shareholder shall continue liable as if the company had not been incorporated.

As the company thus became incorporated for the purpose of its business, it was unnecessary that it should (as in the case of banking companies trading under 7 Geo. 4, c. 46) appoint a public officer for the purpose of suing and being sued. The company itself was able to bring and defend actions and suits in its own name without any special enactment for that purpose, but the statute provides that any person having recovered judgment against the company may, if he cannot obtain satisfaction from the funds of the incorporated body, obtain execution against any shareholder, or against any person who should have ceased for less than three years to be a shareholder, and who was a shareholder when the debt or liability accrued in respect of which the judgment was recovered. I have said that certain companies were excepted from the operation of this Act, and amongst those so excepted were all banking companies.

But concurrently with this Act another Act was passed, 7 & 8 Vict. c. 113, intituled "An Act to regulate Joint Stock Banks in *England*." It differed in some important particulars from the other Act. It did not incorporate any joint stock banking company, but it enabled persons desirous of forming themselves into such a company, upon complying with certain requisitions, to obtain, under the sanction of the Board of Trade, a royal charter of incorporation, subject to various statutable qualifications, and, amongst other things, that, notwithstanding the incorporation, the shareholders should be liable as if they were not incorporated, and there is the same provision as in the former *Banking Act*, and in the general *Joint Stock Companies Act*, making former shareholders liable in certain cases for a term of years after they have ceased to be shareholders.

It thus appears that, under the Act of the 7 & 8 Vict. c. 110, or the *Banking Act*, 7 & 8 Vict. c. 113, the provisions in these two statutes, so far as regards the present question, being nearly the same, the course which a creditor was to take in order to enforce a debt or demand, was to sue the incorporated company as his debtor, and having recovered judgment against that body, he was, in the first instance, to endeavour to levy his debt by an execution against it, and if that did not produce sufficient to satisfy him, then he was entitled to issue execution against any shareholder, or, within certain limits, against any of those who had been shareholders when his right arose. If the present question had arisen under either of these statutes the right of the creditor could not have been controverted. It would have been no answer on the part of any person who had agreed that his name should be on the list of shareholders, and against whom a *fi. fa.* had been sued out, to say that he had been induced by fraud to become a shareholder. This was decided by the Court of Queen's Bench, in a judgment delivered by Lord *Campbell* in the case of *Henderson* v. *Royal British Bank* (1), and nearly at the same time by the Courts of Common Pleas and Exchequer, in cases before them in which the circumstances were similar. Lord *Campbell* said: "It would be monstrous to say that the party against whom the application was made, having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer liable." This observation commends itself so entirely to common sense that I cannot hesitate at once to accede to it.

When this passage was quoted in the argument at the bar, I doubted, and I believe I expressed a doubt, whether Lord *Campbell* had not been wrong in attributing the liability of the person against whom the application was made, in any respect to his having held himself out to the world as a partner, for a shareholder never takes any part in managing the joint business. But on farther reflection I think the observation was just. The application of the creditor was resisted by the shareholder on the ground that he had been induced by fraud to take shares. It is a fair answer, by a creditor, to such a defence to say, "I know nothing of the circumstances which led you to become a shareholder; all I know is, that you in fact allowed yourself to be represented as being a shareholder, and on the faith of your being so I trusted the company." But whether the observation of Lord *Campbell* was or was not altogether warranted, the decision itself seems to me to be incontrovertible, and the only question, therefore, is, whether the same principles ought to govern a case like the present, arising not under the Act of 7 & 8 Vict. c. 113, but under the subsequent Act of 1862.

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(1) 7 E. & B. 356, 3 Jur. N.S. 111, 112.

There are important differences between the provisions of the Act of 1862 and the two Acts of 1844. In the first place, all the enactments contained in the previous Acts for enforcing a debt or demand by execution against a shareholder are repealed. The creditor must, as under the former Acts, proceed against the company; but if, on recovering judgment against the company, he was unable to obtain satisfaction, he has no power to proceed against any individual shareholder. He must obtain an order for winding up the affairs of the company, by causing all its assets to be called in and distributed among all the creditors rateably, as in a bankruptcy. But there is another very material distinction between the two statutes, arising from the power given by the Act of 1862, of constituting a company whose shareholders shall not, like partners at common law, or like shareholders under the Acts of 7 & 8 Vict. c. 110 and c. 113, be indefinitely liable for all obligations of the partnership, but whose liability shall be limited to the extent and in the manner specified in the articles under which the incorporation takes place.

Two modes of limiting the responsibility of the shareholders are provided by the Act, but we need only advert to that which is described in the Act as a limitation by shares. Any joint stock company may adopt such a limitation by making it part of its constitution that the shareholders shall be liable only to the extent of so much of their shares as has not been paid up. This was the principle of limitation on which the firm of *Overend, Gurney, & Co., Limited*, was formed, and with which alone we have to deal.

It may be well to remark that the Act of 1862 (so far as we have to deal with it) is identical with a previous Act passed in 1856, and for convenience, therefore, I will refer only to the Act of 1862.

It is obvious that when the Legislature had sanctioned the principle of limited liability, the powers given by the former Acts of taking out execution against individual shareholders necessarily fell to the ground. It would be impossible for a creditor to know to what extent his right to take the shareholder's goods in execution would exist. This difficulty, indeed, would not arise under the Act of 1862 as to companies formed with unlimited liability; but experience had shewn that the system of execution against individual shareholders often operated very unfairly, and the Legislature probably thought, and correctly thought, that companies with unlimited liability would be but few in number, and the remedy by winding up, which was necessarily adopted in the case of limited companies, was equally just and efficacious where there was no limit, and the same course of proceeding was therefore prescribed in both cases.

The first question then is, whether the change in the mode in which a creditor is obliged, under the Act of 1862, to seek relief, makes any difference as to who are liable to him as shareholders? I think not. In order to bring this question to a test, we may consider how the case would have stood if there had been no change effected by the Act of 1862, except in the mode of making a judgment available. Suppose that the statute of 1862 had only said that, in case of a judgment recovered against the company, the creditor should not levy execution against any individual shareholder, but should proceed to wind up the affairs of the company in the manner there pointed out, I can discover nothing which would in such circumstances relieve from responsibility any person who, if there had been no such change, would have been liable to an execution. The winding-up is but a mode of enforcing payment. It closely resembles a bankruptcy, and a bankruptcy has been called, not improperly, a statutable execution for the benefit of all creditors. The same description may be given to a winding-up, and as in the bankruptcy of an ordinary partnership every person against whom a judgment creditor of the firm could have levied execution as a partner, would be liable to have his estate administered in the bankruptcy, just so must every person against whom a creditor might, under the Acts of 1844, have levied execution as a shareholder, be liable to have his estate dealt with under a winding-up order. The change, therefore, from a right in the creditor to levy execution to a right to wind up the affairs of the company, does not seem to me to affect the question who are liable to the creditors; and as, according to the principle acted on in *Henderson* v. *The Royal British Bank*, the Appellant would certainly have been liable to have his goods taken in execution, so also he must be liable to be dealt with under a winding-up order.

But, if this change in the mode in which the creditor is to seek his remedy, makes no difference as to the persons liable to him, how is he affected by the introduction of the principle of limited liability? I cannot see that he is at all affected by it. His remedy is cut down in amount, but as to the persons liable to him the principle of limited liability has no effect. The introduction of that principle rendered necessary, as I have already stated, some substitute for the remedy by execution against individual shareholders, but it did no more. It plainly left every shareholder subject to all previous liabilities, except only that a line or boundary was fixed, beyond which his obligations could not be extended. I have, therefore, satisfied myself that if the Act of 1862 had done no more than introduce the principle of limited liability, and substitute a winding up of the affairs of the company for execution against individual shareholders, it left the law just as it stood when *Henderson's Case* was decided.

But it was argued that there are provisions in the Acts of 1844 expressly declaring the liability of shareholders to be the same as that of ordinary partners, but which provisions are not found in the Act of 1862. This difference, it was said, makes the principle of *Henderson's Case* inapplicable. The clause relied on for this purpose is the 25th section of the 7 & 8 Vict. c. 110, which, after providing that the persons taking shares, forming themselves into a company, and complying with the requirements of the Act, shall become incorporated, proceeds to say that such incorporation shall not in anywise restrict the liability of any shareholder under any judgment for payment of money recovered against the company;

but every shareholder shall, in respect of such moneys, be and continue liable as if the company had not been incorporated. This is the provision in the general *Joint Stock Companies Act of* 1844, and in the *Banking Act,* 7 & 8 Vict. c. 113, passed on the same day, there is, in sect. 7, a provision to the same effect. There is no such provision in the Act of 1862, and so it was contended that the Legislature must be understood to have contemplated a change in this particular.

I cannot, however, think that this is a fair inference. The introduction of limited liability made the retention of such a provision as those which existed in the Acts of 1844, and to which I have just referred, impossible; and the question is, whether we are to suppose that the Legislature contemplated any other changes as to the liability of shareholders beyond those which were the natural, indeed the necessary, consequence of limited liability? I think not. In the first place, the object of legislation on the subject of these companies has been to enable capitalists to carry on commercial speculations in numbers beyond what the ordinary machinery of the law could deal with. Except by the introduction of the principle of limited liability, legislation has been confined to the giving facilities for carrying on businesses differing in no respect from ordinary commercial partnerships save in the vast extent of capital embarked, and the great number of the partners engaged. I cannot conceive that the Legislature intended by the Act of 1862 to introduce any rules or principles as to the acts or conduct whereby a person should render himself liable to be treated as a shareholder different from those which existed previously. The omission of the clauses declaring shareholders to be liable, as if not incorporated, was, as I have pointed out, necessary; but the Act seems to me to contain, on the face of it, ample proof that the rights of creditors were not intended to be affected, except only by the introduction of the principle of limited liability.

In the first place, I will refer to the 49th section of the Act of 1844, 7 & 8 Vict. c. 110. It is there provided that the directors of every company shall keep a register of shareholders containing their names and addresses, shewing also the number of shares they respectively hold, and the amount paid up; and, by the 50th section, every shareholder is to have liberty to search this register at all reasonable times. Nobody, however, was to be at liberty to search it who was not a shareholder. There is a similar obligation in the Act of 1862 as to keeping a register; but there is an important change; for, by the 32nd section of that Act, it is provided that the register shall be open to the inspection not only of shareholders, but, on payment of one shilling, of all other persons, which would therefore include creditors. This seems to me strongly to indicate the intention of the Legislature that the creditors were to look to this document as shewing them to what extent they might trust the company. Before the introduction of the principle of limited liability such a power of inspection was not necessary, or, certainly, not at all so necessary. A creditor could hardly fail to know who were some at least of the shareholders, and there was no limit to the extent to which he might obtain execution against shareholders of wealth. But when the Legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world, indicating, as I think, very clearly that persons dealing with the company might trust to that register as containing a true exposition of the assets they had to rely on. The permission to all persons not shareholders to inspect the register, and so to ascertain who are shareholders, and to what extent they are liable, would have been an unwarrantable exposure of the affairs of the company, were it not that all persons have, or may have, an interest in knowing who are liable, and to what extent.

This view of the case is strongly confirmed by the language of the statute where it defines contributories. Sect. 74 defines contributories to be all persons liable to contribute to the assets in the event of the company being wound up; and sect. 38 declares that on that event every present and past member shall be liable to contribute subject to certain qualifications. In order to ascertain who are designated by the word "members" in sect. 38, we must refer to sect. 23, which states that every person who has agreed to become a member, and whose name is entered on the register, shall be deemed to be a member of the company.

The name of Mr. *Oakes* was certainly entered on the register; if, therefore, he agreed to become a member within the meaning of this 23rd section, he is a contributory. The argument is, that he did not so agree, because all which he did, he did under the influence of fraud and misrepresentation. But assuming all that to be, and I believe it was, just as Mr. *Oakes* represents it, still he did agree to become a member—that is, he in fact agreed. He may have full rights against those who deceived him, but with that the outer world can have no concern. The Legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they had to trust. It intended to put the persons whose names are on it in the same position towards creditors (subject, of course, to the statutable restrictions) as persons engaged in an ordinary partnership, or persons trading formerly under the Acts of 1844. In neither of those cases would it have been any answer to a creditor, that the person sought to be charged had been induced by fraud to become a partner or a shareholder, and I see no reason whatever for adopting any other principle here.

It was strongly pressed upon us that a decision against Mr. *Oakes* would be at variance with the case of the *Venezuela Railway Company* v. *Kisch* (1), decided in this House a few months since. But there is no inconsistency between the two decisions. The question there was not one in which creditors were concerned. It was the case of a person seeking, against a company, to be relieved from a contract into which he had by fraudulent representations of that company been induced to enter. This House held, conformably with the decision of the Lords Justices, considering the fraud to be established, that the company could not compel the person thus deceived to retain the shares which he had thus been fraudulently induced to purchase. This decision proceeded on grounds of obvious justice and good sense, on which Courts both of law and equity, including this House, have of late frequently acted. But it has no bearing on a question between the shareholders and creditors. Great stress was laid on a part of the language which I

(1) Law Rep. 2 H. L. 99.

used in expressing my opinion, and which is supposed to be inconsistent with what I have given as my opinion in the present case; but I do not see any such inconsistency. The question there was, whether, as between *Kisch* the Respondent and the company, he was to be treated as a shareholder. This House held that he was not. He had been imposed upon by means of a fraudulent concealment of something which the company ought to have disclosed. The company contended that he must be taken to have known the facts which were concealed from him, for that those facts appeared on the face of the articles of association, and the statute provides that the articles of association shall bind every member whether he seals them or not. Mr. *Kisch* did not seal them, but the company contended that he must be taken, according to the statute, to have done so, and so to be aware of their contents. I thought that such an argument did not lie in the mouth of the directors, that they could not by fraudulently concealing what they ought to have disclosed, induce a person to become a member, and then say, your membership gives you, by force of the statute, knowledge which prevents you from alleging that there was fraudulent concealment. I was then, and am still, of opinion, that as between the parties then in litigation, and with reference to the clause in the statute to which I have referred, he was not a member. But such a case has evidently no bearing on a question between the shareholder and a creditor.

The conclusion at which I have thus arrived makes it not absolutely necessary that I should express any opinion on the question of fact. But it must not be supposed that because I do not investigate closely the question of fact, therefore I doubt the soundness of the opinion expressed by my noble and learned friend.

For the honour of the great mercantile community of the city of *London*, I wish I could have believed that the prospectus was honestly and fairly framed. But I cannot; I must believe that the truth was intentionally concealed, and hopes held out which those who framed the prospectus must have known would deceive those who trusted to it. There were both *suggestio falsi* and *suppressio veri.* But, for the reasons I have stated, this does not, in my view of the case, affect the liability of Mr. *Oakes.*

There were two or three matters of a minor character put forward in a supplemental form, to which I may advert, though I think they rest on no solid grounds. It was said Mr. *Oakes* never agreed to become a member of the company whose business is indicated by the memorandum of association actually filed. A change was made in that memorandum after he had agreed to take shares, and before it was filed. The change was not of any great importance, but I am far from saying that if Mr. *Oakes* had, within a reasonable time after he agreed to take shares, examined the memorandum, and found that it differed, in however small a degree, from that on the faith of which he had acted, he might not thereupon have repudiated his status as a shareholder. But it is impossible to allow a person who has taken shares, and has gone on for nearly a year taking his chance of profit, to turn round when the speculation has proved a failure, and claim to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted. It is the duty of a person taking shares in a company to use all reasonable diligence in ascertaining the terms of the memorandum of association, which is, in fact, his title deed. It was certainly very wrong to make any change in the language of the memorandum of association, but there is no reason to suppose that that act was done otherwise than with honest intentions.

The Appellant then contends, that in consequence of this change there never was an incorporated company. I think that the section of the Act giving effect to the certificate of the registrar is an answer to this suggestion. But farther, if there never was a company, then there could be no valid winding-up order, and the proper remedy of Mr. *Oakes* would be to get rid of that order, or to take such steps as might be right on the assumption that no such order exists. The same observation applies to the objection that there was no proper meeting sanctioning the winding-up.

The only point on which I think the decree of the Vice-Chancellor was wrong, is the mode in which he has given the costs. It was wrong to mix up together the costs of Mr. *Oakes*, and of the other Appellant, Mr. *Peek*. Each of these gentlemen must be answerable for the costs incurred in his own petition, and the decree must, in that respect, be varied.

I need say nothing as to Mr. *Peek's* appeal, except that he certainly stands in no better position than Mr. *Oakes*.

I entirely agree with the opinion of my noble and learned friend with reference to the manner in which he recommended your Lordships to dispose of these appeals.

LORD COLONSAY:—

My Lords, in regard to one important part of the Appellant's case there is, unhappily, no room to doubt. I allude to the deceptive character of the prospectus. The evidence contained in the case itself discloses a state of matters to which no Court of law, no Court of equity, no Court administering law and equity, can hesitate to attach the legal character which the Vice-Chancellor has attached to it. The suggestions and arguments by which it was attempted to give to these transactions a different complexion, may have a legitimate influence on the judgment to be pronounced by a more numerous tribunal out of doors on the morality of some of the actions that have been brought before us, but they were not such as could weigh with this tribunal in dealing, as a Court, with the rights of contending parties. Upon this part of the case I do not consider it necessary to say more.

But out of the state of matters to which I have been alluding, the fictitious origin, and the disastrous termination of this great scheme of *Overend, Gurney, & Co., Limited*, has arisen the important question we are now called upon to decide. The company was announced as incorporated under the Act of 1862, with limited liability. The prospectus bore date the 12th of July, 1865. The company stopped payment the 11th of May, 1866. Proceedings were adopted for having the company wound up under the Act of 1862, and on the 22nd of June, 1866, Vice-Chancellor *Kindersley* made an order for winding up under the supervision of the Court.

Assuming, for the present, that the registration, and the proceedings for winding-up, to which I shall afterwards advert, were regular, and that the company is now properly in course of being wound up under the supervision of the Court, what is the position of the Appellant, Mr. *Oakes?* On the 16th of July, 1865, he applied for shares, which were allotted to him, on the 28th of July he made the stipulated payments, and his name was placed on the register.

After the stoppage of the company, in May, 1866, some of the shareholders caused investigations to be made, which resulted in certain discoveries that have led to the present litigation. It does not distinctly appear whether Mr. *Oakes* was or was not a party to those investigations, but I think he is entitled to have it assumed in his favour that, if he was not directly a party to those investigations, he was at least watching those proceedings, and intending to avail himself of the result, of the investigations. In the meantime the liquidators had been making up a list of contributories, and had placed the name of Mr. *Oakes* on that list, and on, I think, the 20th of August, 1866 (there seems to be some difference in the statements as to the date, but at any rate it was about that time), they made a call of £10 per share on Mr. *Oakes*, and others. On the 30th of October, 1866, the Appellant's solicitors gave notice of a motion to have the Appellant's name taken off the register, and off the list of contributories, and to stay proceedings for enforcing the call. That application was ultimately refused by Vice-Chancellor *Malins*, and we are now reviewing his judgment.

The ground on which the Appellant rested his application was, that he had been induced to apply for, and accept, shares in the company entirely through fraud on the part of the directors, the fraudulent character of the prospectus issued by them, and that as soon as he became aware of the fraud, or could have become aware of it, and before he had dealt with the shares in any way, or had derived any benefit from them, he had challenged the transaction, and demanded to be relieved. He refers to the case of *Railway Company of Venezuela* v. *Kisch* (1), and other cases, as shewing that, at all events, in a question with the company he would be entitled to repudiate the contract, and to have his name removed from the register. Then, starting from that point, he says, as to the creditors of the company, that there was no privity of contract between him and them, that they did not transact with him, or with the shareholders, but only with the company in its corporate capacity, and that they cannot, through the liquidator, subject him to any liability to which the company could not have

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(1) Law Rep. 2 H. L. 99.

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subjected him; that the liquidator could only take up the rights of the company subject to such equities as could be pleaded against the company; and, consequently, subject to the Appellant's right to be relieved from the contract to which he had been induced by the fraud of the company.

This view is rested, in some measure, on the corporate character of the company, and on certain recognised principles of law as to the relative position of the creditors of corporations and the individual members of such corporations, and it is contended that the the Act of 1862 must be read and construed with reference to these principles, and giving effect to them in so far as that Act has not expressly, or by necessary implication, displaced them as to companies such as this. The Appellant says that certain decisions and *dicta* that have been founded on by the liquidators are inapplicable, inasmuch as they occurred under a different state of the law, and as to companies which were then governed by a different statute—a statute that expressly provided that, in regard to such questions, they should be dealt with as if the companies were not incorporated. Farther, he examines the Act of 1862, and contends that there is nothing in the provisions of that Act, when read according to their true intendment, which can be held to deprive him of the relief he demands. The case of the *Reese River Mining Company* (1) is referred to as a recent and direct authority in favour of the Appellant.

Such is a brief outline of the case that was presented to us on behalf of the Appellant, and which was elucidated and enforced in argument with remarkable ability.

Up to a certain point the argument for the Appellant commanded my assent at the time, and I have not, on reflection, seen any sufficient reason to withdraw that assent. If this case had been presented to us in circumstances similar to those which existed in the case of *Kisch*—if while *Overend, Gurney, & Company, Limited*, was a going company, it had made a demand on Mr. *Oakes* for a call, and he had resisted it on the ground of fraud, I think he might have been entitled to succeed in that resistance, and to have his name removed from the register. Whether that would have finally exempted him from any possible contingent

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(1) Law Rep. 2 Eq. 264; see also Law Rep. 2 Ch. Ap. 604.

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demand in the event of an immediate stoppage and winding up of the company, I do not think it necessary to inquire. The case now before us has reference to a company which had stopped payment, and was in course of being wound up, while the Appellant's name was still on the register, and before any challenge was made. The cases, therefore, are not the same. It may be that the decision in the case of *Kisch* advances the Appellant a step in his argument. It may even be that it gives him a resting place for the engines by which he is to endeavour to remove other obstacles. But those other obstacles required to be removed, and the question is, whether they have been effectually removed by the power of the argument that was used?

Having given to the case the most careful consideration, I have come to the conclusion that the argument for the Appellant ought not to prevail. I think it proceeds on an erroneous view of the nature of these companies, and of the relative positions of the creditors and the members of these companies.

This company was formed under the provisions of the Act of 1862, which was a comprehensive, repealing, and consolidating Act, collecting, as it were, into one code the provisions which were thenceforth to be applicable to such companies.

During the immediately preceding period of thirty-seven years there had been a continuous course of legislation on the subject, beginning, in 1825, with the 6 Geo. 4, c. 91, which repealed the Act of the 6 Geo. 1, c. 18. After 1825 statute after statute followed in rapid succession, some fifteen or eighteen statutes having been passed on the subject before matters were brought into the position in which they have been placed by the Act of 1862.

Now, what was the tendency and scope of that course of legislation? An important part of it, indeed the great object of it, was to give to the formation of joint stock trading companies facilities and encouragement which had previously been withheld from them. The genius of the law of *England*, which regarded with disfavour the notion of an incorporated company having a *persona* distinguishable from its component members, was very unfavourable, if not an absolute barrier to the formation of joint stock companies. Accordingly the efforts of the Legislature were directed to giving to these companies a separate *persona*, yet not conferring upon them all the attributes of proper corporations without qualification. That principle pervades the whole of the legislation on the subject. I am not speaking of limited liability companies only. Limited liability is merely a step, and a recent step, in the progress. My observations apply to joint stock trading companies generally. The course of legislation was to rear up the company into a separate *persona*, with certain powers and privileges, but without conferring on it in an unqualified manner all the attributes of a perfect corporation. The companies were said to be incorporated, but they were only incorporated to certain effects—they were *quasi*-corporations.

In giving this position to joint stock trading companies, provisions were introduced on the one hand to preserve the members from unnecessary molestation by creditors of the company, and on the other hand to preserve the rights of creditors to ultimate payment out of the estates of the members. Among the most important of these were the provisions as to registration of the companies and of the shareholders, and the right of any one to inspect the register (which is given in the two next statutes) and the provisions for winding up, which were some of them embodied in separate statutes, of which there are two or three.

In 1855 came the first Limited Liability Act. Beyond giving power to limit the pecuniary amount of the liability of each shareholder it made no important alteration, I think, in law, in the relative position or rights of creditors or members. Indeed sect. 16 provides that it is to be taken as part of the Act of 1844, the 7 & 8 Vict. c. 110. In 1856 came an Act of the nature of a consolidating Act. In 1858 the limited liability principle was extended to banking companies.

In 1862 came the Act now in force, and which, I think, must be taken as the code applicable to these companies. It bears in the preamble of it to be intended to consolidate and extend the principles of those companies. It also sets forth the various departments into which it is divided, and seems to be a comprehensive code of law applicable to them.

Such having been the course of legislation, and such the character of the Act of 1862, we may expect to find in it a solution of the question, who are to be regarded and treated as contributories when such companies come to be wound up? If we are not to look beyond the words of the Act of 1862 for a solution of that question, it does not appear to me that there would be much difficulty in the case. The 74th section tells us that "a 'contributory' shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound up." Sect. 38, which relates to the liability of members, tells us that "in the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets" of such company. And sect. 23, which defines a member, tells us that every "person who has agreed to become a member of a company under this Act, and whose name is registered on the register of members, shall be deemed to be a member of the company."

The Appellant says that he cannot be held to have agreed to become a member, inasmuch as his application for an acceptance of shares was induced by fraud, and never having done anything to affirm the contract, he is still entitled to disaffirm it. I cannot agree in that. The contract was not void, it was only voidable. What does that mean? I think that point was well put by Mr. *Mellish* in the course of his arguments. He said, that a contract obtained by fraud is voidable, but not void; does it mean void till ratified, or valid till rescinded? The latter is the rule where the rights of third parties intervene. That I hold to be clearly the import of the doctrine that a contract induced by fraud is not void but voidable. I hold that the Appellant did agree to become a member of the company. He may have been induced to agree by fraud, but, having regard to the language of the statute, what we have to look to is, whether he has agreed to become a member or not. It might be a different case, and would be a different case, in regard to a party who had no power, no will, to give an assent, such as an insane person or a pupil. But when the question comes to be as to a party who has the power to act, although he may afterwards recall what he has done upon a certain footing, still in the meantime he has agreed, and what is only voidable, and not void, cannot be held as invalid until it has been rescinded. I do not very well see how that is to be got over.

In this case the Appellant says that all this must be read subject to the overruling operation of certain legal principles. First, the principle that in corporations there is no privity of contract between the individual corporators and the creditors of the corporation; second, that in such questions there is no room for the doctrine of "holding out;" and thirdly, that as the claims or rights of the creditors can only be enforced through the corporation, they must be subject to any latent equities competent to the corporator as against the incorporation. These three propositions appear to me to involve several fallacies. First, it is a fallacy to hold that the liability of the partners of these companies must rest entirely on the same principle of contract which was the foundation of the liability of the partners of unincorporated companies prior to the institution of this class of associations. The question is, not whether there was any privity of contract between the Appellant and the creditors of the company, but it is, whether, under the constitution of these newly-created societies, there is a statutory liability imposed on persons in the position of the Appellant. Secondly, it is an error to hold that creditors are not supposed to trust to the responsibility of the shareholders. The careful regulations as to registers of shareholders, and the publicity to be given to them, form a sufficient answer to that argument. Indeed it is plain from the reason of the thing that no credit would otherwise be given to the abstraction of a company.

It is also a mistake to hold that these companies must, to all legal effects and consequences, be regarded as unqualified corporations, and in no respect as partnerships. I have already shewn that they partake in some respects of both capacities, and I have shewn how and why that condition of matters came into existence. Let us for a moment relieve our minds from the trammels imposed by a technical use of words, and look to the substance and reality of the thing. Why are these companies not partnerships? They are associations of individuals for the purpose of trading with the capital they contribute, and of participating in the profits to be derived from that trade. In several of the statutes they are called partnerships, and in one, if not more of them, provision is made for a deed of partnership. As to their being corporations, I have already shewn that they are so only subject to certain qualifications, and, indeed, in this very statute of 1862, the clause which incorpo-

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rates them provides that, nevertheless, they shall be subject to certain qualifications and liabilities, and when we look to the subsequent part of the statute we find amongst those liabilities the liability of being contributories in the sense that I have described. I think it would be contrary to the tendency and scope of all the statutes to hold that these companies are stripped of all the characteristics of mercantile partnerships, and clothed with all the attributes of perfect corporations, without qualification.

I am, therefore, inclined to distrust an argument which seeks to subjugate the plain provisions of this code to the rules of law applicable to a state of things when no such companies existed.

There is another consideration which leads me to distrust this mode of moulding the provisions of the Act of 1862 into a different shape from that in which the statute presents them. That statute, as I have already observed, professes to consolidate into one code all the laws and rules applicable to these associations or aggregate societies. It prohibits their existence except under the cover and control of its provisions. It is a general statute, applicable to all parts of the kingdom, to *Scotland* as well as to *England*, which was not the case with several of the statutes preceding it in the series. In several of them *Scotland* was excepted—and why? Your Lordships know that the law of *Scotland* in regard to partnerships was not the same as the law of *England*—that in *Scotland*, as in some other countries, the separate *persona* of an unincorporated trading company was fully recognised, and that joint stock share companies for trading existed there at common law, and that the country had derived great advantage from them, as is recorded in a statute passed in the reign of *George* IV. There were other differences also.

Now, I apprehend that the Act of 1862 was intended to establish a uniform system of law in both ends of the island in regard to such companies. But if, in reference to joint stock companies in *England*, the provisions of the statute are not to be read in a literal or obvious sense, but are to be overridden, and qualified, and controlled by implications and inferences deduced from rules of the law of *England* applicable to a state of things antecedent to the existence of any such companies, then, by parity of reasoning in reference to joint stock companies in *Scotland*, the statute would

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be qualified and controlled by implications and inferences deduced from the different principles that had prevailed in *Scotland;* and thus there would be again produced a diversity instead of the uniformity which it was the object of the statute to establish. For these reasons I think that the line of argument which was put forward by the Appellant cannot be maintained.

My Lords, reference was made to the case of *The Reese River Mining Company* as being a direct authority in point (1). I do not think that the decision in that case was necessarily an authority in point, for the circumstances under which that case presented itself for decision appear, from the reports that I have seen of it, to have been materially different from the present. It appears that in that case the party had made an application to have his name removed from the register on the ground of fraud before there had been any proceedings for winding up the concern; and the import of the decision appears to have been, that the case must be dealt with in reference to the state of matters at the time that he made that application, and sought to repudiate the contract. Whether that decision was one which would, upon a consideration of the law, be upheld or not, is not a matter that I have occasion to go into now. I receive it with all the respect that is due to the Court that pronounced it; but it is, in that aspect of it, not the same as the present case. An opinion, indeed, was expressed by one of the Lords Justices which might go to an adverse view of the law to that which I have endeavoured to state, but with all the respect I must have for that opinion, and with all the deference I should be disposed to pay to it, I cannot yield up the opinion which I have now expressed as the deliberate result of a full investigation of the cases and the whole course of legislation in regard to these contracts.

5 Eq 255
262.

As regards other objections which have been stated, and which are of a sort of subsidiary and supplementary character, I shall not add anything to the observations which have been made by my noble and learned friends who have already addressed the House on the subject. I entirely concur in their observations.

With reference to some questions that I myself put at the close of the argument, as to the effect that would be produced by sustaining the plea of the Appellant, whether it would not practically reduce the company to the mere directors who had originally issued the prospectus or not, I wish to explain that in putting those questions I did not form any opinion whatever as to the effect that would be due to that result. I had not at that time considered the whole matter of this case; but I wished to have before me all the facts which I thought might, or might not, enter as elements into the formation of my opinion. In forming my opinion I found it my duty to discharge altogether that element, and to hold that the fact of the Appellant being only associated as a dupe along with others, would not be a reason why he should not have justice dealt to him in the same manner as if he had been the only dupe. In such a proceeding the number of the dupes does not affect the character of the transaction. The greater number of dupes only shews the greater dexterity of the process of inflating the bubble of these concerns.

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(1) Law Rep. 2 Eq. 264; Law Rep. 2 Ch. Ap. 604.

12 Jur N S 616

13 Eq. 92

I therefore concur in the judgment which your Lordships have been advised to pronounce.

Mr. *Swanston*:—Will your Lordships permit me to ask your directions as to one point which I think, if not mentioned now, might afterwards lead to some misunderstanding of your judgment? The application to the Vice-Chancellor was to remove the Appellant's name from the list of contributories. Your Lordships have held that his name should not be removed as against the creditors. May I ask whether your Lordships would now think it right to express an opinion in your judgment as to whether his name should be removed from the list of contributories after the debts are paid?

THE LORD CHANCELLOR:—I really do not think these points ought to be allowed to be raised at this stage. It is becoming very much the fashion to bring up points after the original hearing. I do not think that that is right, or that it is a practice we ought to encourage.

Orders appealed from affirmed, with variation with respect to costs; appeals dismissed with costs.

Lords' Journals, August 15, 1867.

Solicitors for the Appellants: *J. & J. Linklater, Hackwood, & Addison.*

Solicitors for the Respondents: *Maynard, Son, Markby, & Denton.*

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June 25.

WILLIAM J. HOLDSWORTH AND OTHERS . . PLAINTIFFS IN ERROR;

AND

HENRY C. M'CREA . . . . DEFENDANT IN ERROR.

Designs—Registration.

16 Eq 119.
12 Ch D. 715

The same nicety is not required in registering patterns or designs as in describing inventions sought to be protected under the Patent Laws.

The provisions of the 5 & 6 Vict. c. 100, and 21 & 22 Vict. c. 70, are complied with by a person who leaves with the Registrar copies of his design, though without any written description specifying precisely what is the extent of his claim.

If what he claims as his design consists, according to the pattern, of different parts, any one of which might be deemed "a design," his registration of the whole pattern amounts to a claim of the combination, and not of any of the parts thus combined, any one of which, therefore, taken separately, is not protected by the registration.

A. registered as "a design," within Class 12, s. 3, of the 5 & 6 Vict. c. 100, a pattern of a woven fabric. He gave no written description of his claim. The design consisted of six pointed stars on an Albert chain, arranged in a particular manner, and shaded, and he claimed, in his particulars in the action, "the particular collocation of the shaded and bordered stars upon the ornamental chain surface, as shewn in the registered pattern, thus forming together the ornamentation of the woven fabric":—

Held, that the design, in respect of the combination, had been duly registered, and that the pattern, as a combination, was protected.

SC on appeal from decree in Chancery 6 Ch 418

THIS was an appeal against a decision of the Court of Exchequer Chamber (1) which had affirmed a previous decision of the Court of Queen's Bench (2). Mr. *M'Crea*, the Plaintiff below, had brought an action for the infringement of a design applicable to the ornamenting of woven fabrics. In his declaration he alleged that he was the proprietor of the design within the meaning of the 5 & 6 Vict. c. 100, s. 3 (class 12), and that he had registered it according to the provisions of the statute (3). The Defendants pleaded several pleas. The third, which is the only one material, was that the Plaintiff did not cause the design to be, nor was the same, duly registered. The particular of the claim furnished under a Judge's order was in these terms: "The particular collocation of the shaded and bordered stars upon the ornamental chain surface, as shewn in the registered pattern, thus forming together the ornamentation of the woven fabric." The cause was tried before Lord Chief Justice *Cockburn*, at the *London* sittings after Hilary Term, 1864, when it appeared that in order to effect the registration the Plaintiff had furnished to the Registrar of Designs two similar patterns, and portions of the woven fabric, in class 12, to which the same had been applied, accompanied with his name, style, and address, as the proprietor, and specifying the number of the class in respect of which the registration was to be made, but did not furnish the Registrar with any copy, drawing, print, specification, or description in writing, of the thing to be registered. The Plaintiff claimed the whole combination as "a design." It was contended for the Defendants that there had not been such a registration as was required by the statute—that it was not sufficient in a case like the present, where there were several distinct designs, merely to leave the pattern with the Registrar, but that there ought to have been a writing or description setting forth what was the design in respect of which the Plaintiff claimed the benefit of registration, for that, as it stood now, the Plaintiff could claim any one of the several parts. The jury found that the star was new and original; that the combination of the star on the particular ground work, as shewn in the registered pattern, was a new and original design applicable to the ornamenting of woven fabrics comprised in class 12, and that the combination was the design which the Plaintiff intended to register, and which he had registered. On these findings a verdict was taken for the Plaintiff, subject to leave to move to enter it for the Defendants on the third plea. A rule was accordingly obtained, but was discharged, and that decision was afterwards affirmed. This appeal was then brought.

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(1) Law Rep. 1 Q. B. 264.

(2) 5 B. & S. 495.

(3) The statutes are fully referred to in the judgments.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Manisty*, Q.C. (Mr. *Kemplay* was with them) for the Plaintiffs in Error:—

The object of all the statutes on this subject was to furnish, to all parties concerned with such matters, full information as to what was sought to be protected under them, so that, on the one hand,

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the inventor might be protected, and on the other, that persons engaged in the same business might not unwittingly be guilty of infringement. Neither of these objects can be secured if there is ambiguity in the registration, and ambiguity there must be if what is registered as "a design" is, in fact, as it is here, something which consists of different parts, any one of which may be said to constitute a design. To hold this mode of registration sufficient will be to expose all persons in the trade to the danger of actions like the present. Here, if a person imitated the star, or the border, or the *Albert* chain, the Plaintiff might say that he had registered each or any one of them, and might in turn claim all. Now, in *Norton* v. *Nicholls* (1) it was said that the thing to be registered was the design, and not the article of manufacture to which it was to be applied; and there the claim being for several things, alleged to form a combination, but not so registered as to claim the combination alone, the Court held the registration defective. Lord *Campbell*, in delivering the judgment of the Court there, said (2): "Having regard to the language of the Act of Parliament, and to the object of the Legislature, we think that the result of the combination to be protected as 'a design' must be one design, and not a multiplicity of designs." That is decisive of the present case. Here every separate thing has been registered; but addition is not combination, and the claim is really in respect of a multiplicity of designs, the article itself, with the pattern on it, the pattern alone consisting of two or three designs; and nothing has been done to shew to what the claim of the alleged inventor is restricted. If only one thing had appeared in the pattern this sort of registration might have been sufficient; but where, as here, three different things form the pattern, any one of which may be claimed as "the design," it is insufficient, especially as there is no written description to explain and limit the claim, and shew whether that claim is made for one part or two parts, or for all, or for the combination of all. The statute 21 & 22 Vict. c. 70, which permitted a pattern instead of a description, was not intended to apply to a case like the present, where a description was absolutely necessary to define what it was that was really claimed.

(1) 1 E. & E. 761. 5 Jur. N.S. 1203.

(2) 1 E. & E. 765. 5 Jur. N.S. 1

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The third finding of the jury ought not to have been received. It was wrong to ask the jury what was the design which the Plaintiff intended to register. His intention had nothing to do with the matter. The question of fact was, what had he done? the legal effect of what he had done, that is, whether it amounted to sufficient registration or not, was a question for the Court.

Mr. *Mellish*, Q.C., Mr. *Gray*, Q.C., and Mr. *Philbrick*, for the Defendant in Error, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, I certainly cannot anticipate such very serious consequences as have been suggested, by the learned counsel for the Plaintiff in Error, as likely to result from your Lordships affirming the judgments of the Court of Queen's Bench and the Court of Exchequer Chamber. It appears to me that it would rather furnish a protection to manufacturers against any prejudice to their own inventive ingenuity, by the contrivance of other inventions to secure to themselves a monopoly. But whatever your Lordships opinion may be as to the consequences of your decision, the only question which we have now to determine is, whether the Act of Parliament has been complied with by a due registration of the design of the Defendant in Error.

Now, my Lords, before the statute of the 21 & 22 Vict. c. 70, a person who registered a design was obliged to give a certain description of it, either in writing or by a drawing, or by some plan of the design. But by that statute it is declared that, "The registration of any pattern or portion of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, print, specification, or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification, or description in writing, had been furnished to the Registrar under the Copyright of Designs Acts."

In this case the Defendant in Error, in accordance with the provisions of this Act of Parliament, has registered a pattern of his design, without any accompanying description. And the question is, whether that pattern sufficiently describes the nature of the design to which he claims the right by his invention. We have in

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this case an explanation of what it was that the Defendant in Error meant to claim by the registration of the pattern; because, upon the trial, there were particulars of claim delivered in, which described his design to be "the particular collocation of the shaded and bordered stars upon the ornamental chain surface, as shewn in the registered pattern, thus forming together the ornamentation of the woven fabric." And the jury found, first, that the star in question was new and original; secondly, that the combination of the star in question on the particular groundwork, as shewn in the registered pattern, was a new and original design applicable to the ornamenting of woven fabrics comprised in Class 12; and thirdly, that the said combination was the design which the Plaintiff intended to register, and had, in fact, registered.

There can be no doubt, according to what was said by Lord *Campbell*, in the case which was cited of *Norton* v. *Nicholls* (1), that a single design may consist of several elements in combination; and as there can only be the registration of one design at a time, so when a pattern of the material itself is deposited with the Registrar, it must be understood that the entire design, comprehending the whole pattern, is claimed. Now the designer is under this disadvantage, that when he registers a pattern of material, there is no infringement unless it is exactly copied. And in the present instance any person might, I apprehend, have taken the star, without the *Albert* chain work, as part of the design; or he might have placed the star in a different situation; and, possibly, also, he might have taken a different colour for the fabric, and he would not have infringed the design of the Defendant in Error, because his design consisted of the entire combination.

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My Lords, this really seems to me a perfectly plain case. The Act of Parliament merely requires the party to register a pattern of his design, and he has here complied with the provisions of the Act; and it is quite clear that if his claim is for a combination, he has registered that claim by the pattern which he has deposited. Under these circumstances, I apprehend your Lordships will entertain no doubt that the judgment of the Court of Exchequer Chamber ought to be affirmed.

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(1) 1 E. & E. 761. 5 Jur NS 1203

LORD CRANWORTH:—

My Lords, I am entirely of the same opinion. It seems to have been assumed in the argument that the Legislature must have intended, in respect to these copyrights of design, or protections for inventions of designs in textile or woven fabrics, to require all the same nicety and accuracy which is required in the specification of a patent. Now, I rather think that it was the intention of the Legislature not to require that. The protection, in many of these cases, is only for twelve months; and the Legislature would probably think it much better to leave the matter in a somewhat looser state than is the case with regard to patents.

In the original Act, 5 & 6 Vict. c. 100, which includes woven fabrics, the copyright of which, it is complained, has been infringed in this case, in the 15th section the Legislature, having granted a protection for a certain time to persons inventing new ornamental woven fabrics, mentioned in the 3rd clause of the Act, goes on to say—that persons are not to have the benefit of that protection which is given to them unless they register. Then, how are they to register? "The Registrar shall not register any design in respect of any application thereof to ornamenting any article of manufacture or substances, unless he be furnished, in respect of each such application, with two copies, drawings, or prints of such design," accompanied with the name of the person and where he is carrying on business—and so on. Not requiring (as is required in the case of a specification of a patent) any description more than a copy or print representing that which is his invention. That is the way in which the matter stood under the first Act—the Act of 1842.

Then came the Act of the next year, the 6 & 7 Vict. c. 65, which extended practically the same sort of protection to that which was not ornamentation (as it is called) but matter of utility—designs relating to the forms of articles which are in common use, and which are matters useful rather than ornamental. They must be registered; but the language requiring the registration is somewhat different, for there: "the Registrar shall not register any design of the shape or configuration of any article of manufacture as aforesaid, unless he be furnished with two exactly similar drawings or prints of such design, with such description in writing as may be necessary to render the same intelligible according to the judgment of the Registrar." That was new. That was not required in the other Act. The other only requires "copies or prints."

Then came that other Act, which, I think, does not bear materially on the question, the Act of 1850; and, finally, the Act of 1858, in which is found this clause, which was read by my noble and learned friend, which is the clause now in operation: "That the registration of any pattern or portion of an article of manufacture, to which a design is applied, instead or in lieu of a copy, drawing, print, specification, or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification, or description in writing, had been furnished to the Registrar."

Then the question is, has there been a pattern of this manufacture furnished to the Registrar? It is the case of all parties that there has; and the only question really is, whether or not the provisions of the Legislature are sufficiently stringent, according to the view of these parties, to protect them. With that we have nothing to do. It seems to me that we could not, without virtually saying that we repeal the statute, say that when a manufacturer has actually filed with the Registrar a pattern of that which he has manufactured, he has not complied with the terms of the Act, when the Act expressly says that that shall be sufficient. It appears to me, therefore, that the case is perfectly clear, and that the judgment of the Court of Exchequer must be affirmed.

LORD WESTBURY:—

My Lords, the importance of the case appears to me to justify my adding a few observations. The thing registered is the invention claimed. The question is, what is registered when a piece of manufacture with a design impressed upon it is registered without any explanation or addition in writing, and that design consists of several parts, not necessarily united in configuration, but capable of being severed into independent integral parts? Because the gist of the argument on the part of the Plaintiffs in Error,

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which has been well enforced at the bar, and is very clearly stated in the case, lies in the observation, that it cannot be collected with reasonable certainty from the article of manufacture, which the inventor furnished to the Registrar, what the design was what he intended to register, for the registration enabled him, at his option, to claim one or other of several designs. And accordingly it has been argued that the inventor, upon the registration, might at his option have claimed the star alone, or might have claimed the shaded star alone, or might have claimed a star of that particular magnitude alone, or might have claimed that star in juxta-position with other particular stars that appear alone, or he might have claimed the *Albert* chain alone.

[illegible]

Now all these different positions, by way of argument, appear to me to have no foundation in law or in fact, and I think they are all derived out of a mistaken notion of the word "combination." I endeavoured to extract the meaning of the argument by putting it thus to the learned Attorney-General:—"Your notion is that mere annexation, mere addition, is not combination." And the Attorney-General said that was the meaning that he attached to the word. The argument would, therefore, seem to lie in this, that there is an element of uncertainty in every registration where the design appears to be constituted of independent integral parts put together in the pattern registered, but capable of being severed and used in a separate form. Now I apprehend that if that observation was applicable to this registration, the registration would be bad for uncertainty. But that observation is not applicable to a design which is composed of several parts put together, and which, if exhibited in that connection, do undoubtedly constitute one design. We have nothing to do with the artistic merit or beauty of the design. You may have fantastic and grotesque combinations, but if they are all exhibited upon the pattern, and the pattern is registered, then, however destitute of beauty they may be, they do, in the mind of the inventor (and of the registrar), constitute the design he desires to protect. Now, if he is content with putting that design, constituted of these several parts, upon the register without limitation and without explanation, he claims simply to be the inventor of the entire thing, exactly as it is described in the drawing or pattern which he has exhibited; and

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all that he can claim to protect against imitation is, that thing in its exact form and relative position and proportions as they appear upon his pattern. For that is the only thing that you can ascribe to him as an invention. He says, "I substitute the drawing for any description." And it is the policy of the Act of Parliament that the drawing shall speak for itself, where it is competent to speak for itself, and does not require the aid of any limitation or explanation. He says that is my invention, that is my drawing. Anything, therefore, which is a *fac-simile* of that drawing—any other pattern which is a reproduction of that in its integrity—becomes an infringement. But that which is different in shape and form, or in the relative positions of its several parts, which is not a reproduction of it, as a *replica* or copy of a picture, would not be an infringement of the thing so specified.

Undoubtedly we should do very great evil if we introduced into the interpretation of these Acts of Parliament the niceties of the patent law. The difficulties of the patent law arise from ambiguity and obscurity of language in the description; and it has frequently been lamented that you cannot, in allowing articles to be patented, dispense with the description, and content yourself with requiring the exhibition of a model of the very thing that it is desired to protect.

Now, in the case of those things as to which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether, therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same. The only thing which it is here necessary to point out, as well for warning to inventors as for the protection of the public, is this, that if a design, as exhibited in a pattern, is filed and registered by an inventor, without any farther limitation or description than that which is given by the design itself, it protects the entire thing and the entire thing only; and the protection cannot, at pleasure, be made applicable one day to the entirety, and another day to the separate integral parts or elements of the entire design. It must be considered that the protection of the statute is invoked for the entire thing that appears

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upon the register, and is applicable to nothing but the exact copy of the thing so registered.

My Lords, I do not know any other argument upon general principle which it is desirable to notice in your Lordships' judgment in this case. I would advert only to some words that appear in the judgment of the Court of Queen's Bench (probably inaccurately reported), in which the learned Judges say that, as the jurors have found novelty in the invention, no difficulty can arise from the ambiguity of the registration. That, unquestionably, is not, in my opinion, a correct expression of the law. The ambiguity, if ambiguity there is, in the registration of the design would clearly be matter of law, open for the Court to determine, notwithstanding the finding of the jury.

Here, however, I think your Lordships will come to a very safe conclusion, by holding that what appears to be registered, and what was intended to be registered, are one and the same thing. What appears to be registered, and is *de facto* and *de jure* registered, is the entirety of this pattern, and the registration is not capable of being made the subject of ambiguous claims in the manner which the counsel for the Plaintiffs in Error have supposed. There can be no difficulty, therefore, I think, in upholding the judgment of the Court of Queen's Bench, and the Court of Exchequer Chamber, and dismissing this appeal.

LORD COLONSAY:—

My Lords, I have arrived at the same conclusion as the rest of your Lordships on this subject. I think that the statute has been complied with, by giving to the Registrar this pattern of the substance alleged to be registered. But, farther, I think that the question, whether that is a sufficient protection to the party, may arise notwithstanding that he has complied with the provisions of the statute. The party has a choice of two courses to pursue: one, to content himself with giving in a pattern and remaining silent; the other, giving a description of that which he claims as his invention. There is risk in either way. There is a risk in the latter case of there being a misdescription of his claim. That is a question that is frequently raised under the Patent Acts; because there a description is required; and in many patents it would be impossible to proceed without a description. They may consist of discoveries, or they may consist of inventions, or they may consist of combinations of various classes and characters; and it is necessary that the party should explain his invention. It is also necessary, in many of these cases, that he should describe the mode in which effect is given to his invention. That is a requisite of his specification, in order that other people may know of what it is that he has the monopoly. Then, again, where the party exercises the option of silence, and merely produces the pattern of his invention, he is exposed to this:—that in order to claim his protection, he requires to maintain that he claims the entirety of what is exhibited on the face of that pattern; and if only a part is used in a different combination he is without the protection which he would otherwise have had. But it is his own fault if he has not that protection. He chose to run that risk, and if in doing so he has exposed himself to the chance of another party outdoing him in the market by adopting part of his invention, or putting it in a different combination, that is his own fault, his own defect in his procedure.

It is impossible to say, on looking at this thing which has been put before us, that every part of what is claimed in the note of particulars may not truly be regarded as a design of itself. That *Albert* ground is itself a design. So is the star. So is the arrangement; and the whole together is a combined design. Therefore, I think that the conclusion we must come to is, that the statute has been complied with; and that, in order to have the benefit of the protection of his invention, the party must run the risk of having the whole pattern treated as the sole thing which he has registered. In a question of infringement other matters might arise, other points might be raised. For instance, one point which has been alluded to, but which does not present itself in this case—whether, if this arrangement of figures had been put upon a different colour that would have been an infringement. That question is not before us. The question before us is, whether the party has complied with the statute: and all that has been said beyond that is merely in explanation of what is understood to be the meaning of such a registration; and the import and effect of giving in silence a design or pattern to the Registrar, as what is to be interpreted to be the intention or meaning of the party.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed.

Lords' Journals, 25th June, 1867.

Attorneys for the Plaintiffs in Error: *Edwards, Layton, & Jaques.*
Attorneys for the Defendants in Error: *Emmets, Watson, & Emmet.*

JOHN CARLISLE AND ROGER BICKERSTAFFE, CLERK . . . . PLAINTIFFS IN ERROR.

RICHARD WILLIAM WHALEY . . . . . DEFENDANT IN ERROR.

1867
June 7, 18, 20; *July* 16.

Quare Impedit—Pleading—Irish Registration Acts—Practice.

Though a case is brought to this House only upon Error alleged as to the award of a *venire de novo*, the whole record being here, the House will decide on every question of law arising on the record, and therefore on the sufficiency of the pleadings which had been the subject of the judgment in the Court below.

Though the rule of pleading in *quare impedit* is that, both parties being actors, each must shew a title in himself, and though this rule would include the clerk presented by the patron, it does not apply to him if he has been actually instituted and inducted. The rule is applicable to the Defendant, the patron.

The word "action" in the interpretation clause (sect. 4) of the *Common Law Procedure Act* (*Ireland*), 1853, does not restrict the operation of that Act to personal actions, and therefore does not affect the 81st section, which relates to special demurrers:—

Semble, that where a *venire de novo* has been awarded, upon which award, under the 49th section of the 19 & 20 Vict. c. 102, Error may at once be brought, the party against whom that judgment has been pronounced, and who brought Error upon it, is not, by appearing at the trial and there again contesting the matter before a jury, prevented from afterwards bringing such judgment before a Court of Error.

The original Court upon application might, under such circumstances, prevent the trial until the proceeding in Error had been determined.

A plea in *quare impedit* which denies that which it was necessary for the Plaintiff to aver and prove in order to maintain his title, and which plea, if proved by the Defendant, would destroy the Plaintiff's title, is sufficient on general demurrer.

By the 6 Anne, c. 2, s. 4, a registered deed is to be taken as good and

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effectual according to the time of registering the memorial thereof. By the 5th section all deeds prior in date, but unregistered, are to be absolutely void as against the registered deed :—

Held, that under a plea which was in form in bar of the action, and which alleged the time of registration under a videlicet, proof of the registration of a deed which really defeated the action might be given, though the deed was not in fact registered till after the commencement of the action, but before plea pleaded.

The Bishop of Meath v. *The Marquis of Winchester* (1) explained and applied.

RICHARD WILLIAM WHALEY, in Trinity Term, 1859, brought *quare impedit*, in the Court of Common Pleas in *Ireland*, against *Carlisle* and *Bickerstaffe*, *John* Viscount *Massareene* (since deceased), and the Bishop of *Down* and *Connor*.

The first count of the declaration stated that the Right Hon. Sir *Clotworthy Skeffington*, Bart., Earl of *Massareene*, was seised in fee of the advowson in gross of the rectory of the church of *Killead*, in the county of *Antrim*, and, being so seised, he, on the 17th of February, 1778, presented to the said church (being then vacant) one *John Clotworthy Skeffington*, clerk, who, upon such presentation, was admitted, instituted, and inducted. That, during the said incumbency, the said Earl, by an indenture of the 12th of June, 1793, conveyed the said advowson to *William Whaley*, his heirs and assigns, by virtue of which conveyance *William Whaley* became seised in fee of such advowson in gross; and being so seised, by indenture of August, 1793, conveyed it to *Bernard Ward*, who, in April, 1801, reconveyed the same to the said *William Whaley*, his heirs and assigns, by virtue of which *William Whaley* became seised of the same as of right; that *William Whaley*, being so seised, the church became vacant by the death of the said *John Clotworthy Skeffington*, clerk, on the 3rd of November, 1800, by reason whereof it belonged to *William Whaley* to present, &c.; but one Right Hon. *John* Earl of *Massareene*, usurped upon the said *William Whaley*, and on the 18th of July, 1801, presented one *Bernard O'Doran*, his clerk, who was then and there admitted, instituted, and inducted; that the church afterwards became vacant by the death of the said *Bernard O'Doran*, on the 8th of November, 1815, and by reason thereof it belonged to *William Whaley* to present, &c.; but one Right Hon. *Chichester* Earl of *Massareene*, usurping on the said *William*

(1) 4 Cl. & F. 445, 556.

Whaley, on the 9th of November, 1815, presented one *William George Macartney*, clerk, who, on the said presentation, was admitted instituted, and inducted; that *William Whaley*, being so seised, &c., as aforesaid, made his will, and thereby devised the said advowson to the Plaintiff *Richard William Whaley*, his heirs and assigns, and died seised thereof, after whose death the said *Richard William Whaley* became and was seised of the said advowson, &c., as of fee and right; and, being so seised, the church became vacant by the death of the aforesaid *W. G. Macartney*, whereby it belonged and now belongs to the said *Richard William Whaley* to present, &c.; but the said Defendants, *John Skeffington* Viscount *Massareene*, *John Carlisle*, and *Roger Bickerstaffe*, and the said Bishop, will not permit him, but unjustly disturb and hinder him, &c.

The second count was the same as the first, omitting the statement as to the conveyance to *Ward*, and his reconveyance.

The third and fourth counts were the same, only varying in the description of the devise to *R. W. Whaley*.

The fifth count was like the second, except that it described *R. W. Whaley* as succeeding to the advowson in right of being heir-at-law to his father.

The Bishop pleaded a disclaimer of title save as ordinary. The other three Defendants joined in their pleading.

The first plea, which was a plea to all the counts of the declaration, alleged that the Rev. *Roger Bickerstaffe* was parson imparsonated of the church, upon the presentation of *John* Viscount *Massareene*, and *John Carlisle*; that *Chichester* Earl of *Massareene* was seised of the advowson, and rightfully presented; that the said *Chichester* Earl of *Massareene* died, leaving *Harriet* Viscountess *Massareene* his only child, and heiress-at-law; that the advowson descended to her, and on her death to the Defendant *John* Viscount *Massareene*, who, on the 16th of May, 1855, by indenture of that date, granted to *John Carlisle* the next nomination; that *Macartney*, died in November, 1858, and Viscount *Massareene* and *John Carlisle* jointly and severally presented *Roger Bickerstaffe*, who, in January, 1859, was thereon inducted. The plea concluded with a special traverse that Sir *Clotworthy Skeffington*, Earl of *Massareene*, had granted the advowson to *William Whaley* in June, 1793, as alleged.

The second plea, which was pleaded to all the counts in the declaration, stated that the Defendant, *Roger Bickerstaffe*, was the parson imparsonated of the church, upon the presentation of Viscount *Massareene* and *John Carlisle;* that *Chichester* Earl of *Massareene* was seised of the said advowson; that, the church being vacant, he rightfully presented; that he died in May, 1816, leaving *Harriet* Viscountess *Massareene* his sole heiress-at-law; that she died in January, 1831, and the advowson descended to her son and heir-at-law, the Defendant, *John* Viscount *Massareene*; that he, on the 16th of May, by indenture, granted the next nomination to the Defendant *John Carlisle*; that *Macartney* afterwards, on the 12th of November, 1858, died, and the church first became vacant after the deed of 1855; that they jointly and severally presented *Bickerstaffe*, who was duly inducted on the 14th of February, 1859. The plea thus concluded: "Without this that the said *Clotworthy Skeffington* Earl of *Massareene*, in the said declaration mentioned, presented the said *John Clotworthy Skeffington*, clerk, as in the said several counts of the said declaration is alleged, or that the said *John Clotworthy Skeffington*, in the said declaration named, was upon the presentation of the said Sir *Clotworthy Skeffington*, Earl of *Massareene*, admitted, instituted, or inducted, in manner and form as in those counts is alleged."

The third plea, pleaded to the first and third counts, was similar to the other two, but concluded with a special traverse of the grant in 1801 from *Ward* to *William Whaley*.

The fourth plea, pleaded to the first and second counts was similar in form, concluding with a special traverse of the devise by *William Whaley* to *Richard William Whaley*, the Plaintiff.

The fifth plea, pleaded to the third and fourth counts, in like manner shewed title in Viscount *Massareene*, and concluded with a traverse of the devise by *William Whaley* to the Plaintiff.

The sixth plea in similar form was pleaded to the fifth count, concluding with a special traverse that the Plaintiff was the heir-at-law of *William Whaley*.

The seventh plea was pleaded to the second, fourth, and fifth counts, and alleged that after the execution of the deed of the 12th of June, 1793, in those counts mentioned, *William Whaley*, by a lost deed, granted the advowson to *Bernard Ward*, in fee, concluding with a special traverse that *William Whaley* died seised of the same.

The eighth plea, which was pleaded in bar to all the counts, admitted that Sir *J. Clotworthy Skeffington*, Earl of *Massareene*, was seised of the advowson, and alleged that the deed of June, 1793, was executed after the passing of the Act 6 Anne, c. 2, for the registration of deeds in *Ireland*, and that no memorial of the said deed was registered pursuant to the statute. It then recounted the successions to the Earldom, and alleged that the advowson descended to *John* Viscount *Massareene* as the heir-at-law of the Viscountess, and also of the Earl, save so far as it was affected by the indenture of June, 1793. It then alleged the sale, by Viscount *Massareene*, by indenture of the 16th of May, 1855, to *John Carlisle*, of the next presentation, and that a memorial of the indenture of the said sale was duly registered in the office for registering deeds in *Ireland*, pursuant to the statutes, and that by reason of the premises, the indenture of June, 1793, was void as against the indenture of May, 1855, and it alleged, as before, the presentation of *Macartney*, and his induction by Viscount *Massareene* and *Carlisle*.

The ninth plea, pleaded to all the counts, stated that *William Whaley*, after the making of the indenture of June, 1793, and whilst he was seised, &c., on the 1st of July, 1801, reconveyed the advowson to Sir *Clotworthy Skeffington*, Earl of *Massareene*, who presented on the 8th of July, 1801, that he died, and the advowson descended to *Henry*, his brother and heir, and afterwards to *Chichester*, his brother, who presented *Bernard O'Doran* in 1815, that he died, and that the advowson descended to the Viscountess, and from her to the Viscount, her son and heir, and that he granted to *John Carlisle*, and they jointly presented *Roger Macartney;* and the plea concluded with a special traverse that *William Whaley* died seised.

The Plaintiff replied that the indenture of May, 1855, was not duly registered as alleged. He demurred specially to the second, sixth, and seventh pleas, and took issue on the others (1).

The cause was tried on the issues of fact at the *Antrim* Assizes, in July, 1861, before Mr. Baron *Hughes* and a common jury, when the Defendants tendered in evidence a memorial of the deed of

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(1) In 1861 there was a motion by the Defendants to be allowed to plead the registered memorial in bar of the farther maintenance of the action, in conjunction with the plea already on the record. The motion was refused. The Court said that they might withdraw one and plead the other. 6 Ir. Jur. (N.S.) 19.

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May, 1855, registered on the 9th of January, 1860, a few days before the filing of the pleas. The Plaintiff's counsel objected to its admissibility on the ground that there had been no registration until after the commencement of the action. The learned Judge, however, received the memorial in evidence, and an exception was tendered to his ruling. He also directed the jurymen to find on the evidence that the deed of May, 1855, was duly registered on the 9th of January, 1860, and they found accordingly, and on this issue the verdict was found for the Defendants. They also found that Sir *Clotworthy Skeffington*, Earl of *Massareene*, conveyed the advowson to *William Whaley* in June, 1793, that *Ward* conveyed to *Whaley* in April, 1801, that *William Whaley* devised to the Plaintiff, that *William Whaley* did not reconvey to Sir *Clotworthy Skeffington*, Earl of *Massareene*, and a general verdict was found for the Plaintiff. On exceptions to this ruling and the findings, they were allowed by the Court, and a *venire de novo* awarded, whereon the Defendants brought error in the Exchequer Chamber, where the judgment was afterwards affirmed (1).

The Court of Common Pleas had given judgment for the Plaintiff on the demurrers, and this judgment was likewise affirmed in the Exchequer Chamber.

After the bringing of Error on the judgment which awarded a *venire de novo*, the Plaintiff carried down the cause to trial; the Defendants appeared (2), took exceptions to the evidence, and to the direction of the learned Judge, but a verdict was found for the Plaintiff, and again a *venire de novo* was granted. A third trial, when the jurors were discharged, and a fourth trial, ending with a verdict for the Plaintiff, took place under the same circumstances.

On judgment being finally entered for the Plaintiff, Error was brought to this House. When the cause came on for hearing a preliminary objection was taken that the Defendants by going on with these trials had precluded themselves from bringing Error on the original judgment. The argument on this objection was only partly heard. The subject is noticed in the opening remarks of the Lord Chancellor.

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(1) 7 Ir. Jur. (N.S.) 278.

(2) They had moved to restrain him from doing so pending the appeal. Mr. Justice *Keogh* made an order to that effect on condition of the Defendants undertaking to speed the appeal. 8th July, 1862. 7 Ir. Jur. (N.S.) 323.

Mr. *Mellish*, Q.C., and Mr. *Cohen*, for the Plaintiffs in Error:—

The declaration here did not shew a good title in the Plaintiff, for it admitted two presentations in his lifetime, made in disregard of the title he set up, while the pleas shewing that *Macartney* had been admitted, instituted, and inducted, established the fact that the Defendants were in possession, and therefore a traverse of the title of the Plaintiff was admissible, and he was bound to make it out.

Both the parties here are not actors, and are not, therefore, equally bound to shew title. The ordinary rule that they are so applies only where the church is vacant, and where each party wants a writ to the Bishop. Here the church was full on the presentation of the Defendants, who were therefore in possession: *Tufton* v. *Temple* (1). Plenarty upon a presentation before the *quare impedit* brought is a good plea in bar, for that is possession joined to inheritance, *Mallory* (2); *Roscoe*, on Real Actions (3), is to the same effect. All the authorities are collected in *Comyn* (4).

There were two exceptions to the memorial of registration of the deed of May, 1855: first, it was said that the memorial was not admissible in evidence at all; and next, that, even if admitted, it did not support the issue. The Courts below were of opinion that, as the eighth plea began as a plea in bar, the Defendants could not, under it, give evidence of any fact which happened after the commencement of the action. That was an error. The instant the deed of 1855 was registered, whatever title the Plaintiff might have had under that of 1793 was gone. *Latouche* v. *Dunsany* (5), merely decides that the deed shall have effect from the time of registration, but does not decide that if registered after the commencement of the action, it shall not be given in evidence in that action. There is nothing in the *Registry Act*, 6 Anne, c. 2, which refers to any time at which the registry is to be made, or when it is to take effect, but it directs that a registered deed shall be deemed valid, and an unregistered deed shall, as against a registered deed, be deemed fraudulent and void (6). The moment, therefore,

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(1) Vaugh. 7.

(2) Tit "*Quare Impedit*," 201.

(3) Page 26.

(4) Com. Dig. Pleader, "*Quare Impedit*" (3 I. 9).

(5) 1 Sch. & Lef. 160.

(6) 6 Anne, c. 2 (Ir.), is declared by the preamble to be passed "for securing purchasers, preventing forgeries and fraudulent gifts and conveyances of

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that the deed of May, 1855, was registered, it became, under that Act, conclusive evidence of title, and, as against it, any deed, no matter though previously executed, was fraudulent and void. The registry related back to the time of the execution of the deed on the principle stated in *Vaughan* v. *Atkins* (1), "that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." *Doe* d. *Robinson* v. *Alsop* (2), and

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lands, tenements, and hereditaments, which have been frequently practised in this kingdom."

Sect. 3 enacts that "a memorial of all deeds, &c., which, after the 25th day of March, 1708, shall be made and executed, whereby any honours, manors, lands, tenements, or hereditaments within this kingdom may be by any ways affected, may, at the election of the party or parties concerned, be registered in such manner as is hereinafter provided."

Sect. 4 enacts that "every deed or conveyance, a memorial whereof shall be duly registered according to the rules and directions in this Act prescribed, shall, from and after the 25th day of March, 1708, be deemed and taken as good and effectual, both in law and equity, according to the priority of time of registering such memorial for and concerning the honours, manors, lands, tenements, and hereditaments in such a deed or conveyance mentioned or contained, according to the right, title, and interest of the person so conveying such honours, manors, lands, tenements, and hereditaments against all and every other deed, conveyance, or disposition of the honours, manors, lands, tenements, or hereditaments, or any part thereof, comprised or contained in any such memorial as aforesaid."

Sect. 5 enacts "that every deed or conveyance not registered, which shall be made and executed from and after the 25th day of March, 1708, of all or any of the honours, manors, lands, tenements, or hereditaments comprised or contained in such a (*sic*) deed or conveyance, a memorial of which shall be registered in pursuance of this Act, shall be deemed and adjudged as fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors by judgment, recognizance, statute merchant, or of the staple confessed, acknowledged, or entered into, from and after the 25th day of March aforesaid, as for and concerning all or any of the honours, manors, lands, tenements, or hereditaments contained or expressed in such memorial registered as aforesaid."

Sect. 7 enacts "that the memorial shall contain the date of the deed, the names and descriptions of the parties, and of the witnesses; and it shall express or mention the honours, lands, &c., in such manner as the same are expressed or mentioned in such deed," &c.; and then directs "that every such deed, conveyance, or will, or probate of the same, of which such memorial is to be registered as aforesaid, shall be produced to the said register [registrar] or his deputy, at the time of entering such memorial, who shall endorse a certificate," &c.

(1) 5 Burr. 2764.

(2) 5 B & Ald. 142.

Elsey v. *Lutyens* (1), shew that the registration defeats in this country a prior deed not registered, even though the grantee of the later deed knew of the existence of the earlier one, though, perhaps, equity in such a case might grant relief: *Le Neve* v. *Le Neve* (2). In *Warburton* v. *Loveland* (3), the same rule was held to apply in *Ireland*. In *Doe* d. *Bennington* v. *Hall* (4), a title defective at the time of action brought was held good if made valid afterwards. *Heslop* v. *Baker* (5), proceeds on the same principle. These cases shew that the plea being pleaded in bar, and not to the farther maintenance of the action, did not affect the admissibility of the memorial, for no time was requisite to give effect to it under the statute. In *Mill* v. *Hill* (6), an equity in a grant which was registered under the 6 Anne, c. 2, in *Ireland*, was held to prevail against the right even of a *bonâ fide* purchaser to whom the grantor had subsequently sold part of the property comprised in the registered deed.

Though it is true as a rule that matter of defence arising after action brought cannot be pleaded in bar to the action, but only to the farther maintenance of it, *Le Bret* v. *Papillon* (7), yet even there as the substance of the plea shewed that no judgment could legally be given for the Plaintiff, the Court, on the whole record, gave judgment such as appeared to be proper. That rule must be applied here. *Allen* v. *Hopkins* (8), is to the same effect. So, in *Cobbett* v. *Sir G. Grey* (9), a plea in bar justifying under a statute which afforded a defence arising subsequently to the commencement of the action was held good after verdict. These are decisive authorities in support of the Defendants' right to judgment.

As to the form of the pleas here. The opinion of Lord Chief Justice *Tindal*, in *The Bishop of Meath* v. *The Marquis of Winchester* (10), was referred to. His Lordship there said, "It is clearly established that neither the clerk, nor the ordinary, in that character, could counterplead the Plaintiffs' title at common law, for neither of them had any interest in the patronage; and under the statute 20 Edw. 3, stat. 3, c. 7, the incumbent as possessor

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(1) 8 Hare, 159.
(2) Amb. 436.
(3) 2 Dow. & Cl. 480.
(4) 16 East, 208.
(5) 8 Ex. 411.
(6) 3 H. L. C. 828.
(7) 4 East, 502.
(8) 13 M. & W. 94.
(9) 4 Ex. 729.
(10) 4 Cl. & F. 445, 556.

(when presented and instituted), could not counterplead the Plaintiff's title without maintaining his own title, and that of the patron on which his own depends. This is distinctly laid down by Lord *Hobart* in *Elvis* v. *The Archbishop of York* (1)." That was, in the Court below, erroneously applied to the plea of patron, t relates only to the plea of the clerk. But even as to the plea of the clerk, it may be contended that he has a right to counterplead the Plaintiffs' title, so far as to allege that the last two presentations were in conformity with the title of the patron who presented him. Another case is that of *Reg.* v. *The Bishop of Cork* (2). There it was held that in *quare impedit*, pleas by way of traverse, by either the alleged patron, or his clerk, though the latter has been admitted, instituted, and inducted, must, *pro formâ*, as inducement, shew title in the alleged patron inconsistent with that of the Plaintiff. The pleas here are really in accordance with that decision, as they are with that of *Digby* v. *Fitzharbert* (3), where the same rule is laid down. The rule is not denied; it is repeated in *Colt* v. *The Bishop of Lichfield* (4), and *Reg.* v. *Middleton* (5), and the Defendants have acted on it here. After induction the clerk is possessor, and may then plead in bar, though not before: *Battaile* v. *Cooke* (6).

The pleas here were good on general demurrer, and therefore the judgment of the Court below cannot be sustained as to them. The *Irish Common Law Procedure Act*, 1853, directs (sect. 81), that "no objection by way of general or special demurrer for formal matter only shall be allowed, and no pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer." But it is said that that applies only to *actions*, and that *actions* must be taken, under the 4th section to mean personal actions, in which description *quare impedit* cannot be included. The 4th section after defining the word "Courts" as used in the Act to mean "the superior Courts of common law at *Dublin*," goes on to say that "*action* shall be understood to mean any personal action brought in any of the said Courts." This restrictive construction cannot properly be applied to the Act. The preamble is general in its nature, and there are several provisions in the Act which would be totally defeated if its operation was confined to personal actions alone. Thus the 121st section which relates to bills of exceptions cannot be restricted to bills of exceptions in personal actions alone. There are other instances of the same sort. The *English Common Law Procedure Act* has nearly the same terms in its interpretation clause, namely that "action shall mean any personal action brought by writ of summons" in any of the superior Courts, and that Act has been held to apply to *quare impedit: Marshall* v. *The Bishop of Exeter* (1).

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(1) Hob. 315.

(2) 11 Ir. L. Rep. 114-145.

(3) Hob. 101.

(4) Hob. 162, 163.

(5) Leon. 45, 47.

(6) Dyer, 1 b (8).

Mr. *Prentice*, Q.C., and Mr. *Hume Williams*, for the Defendant in Error:—

The deed of 1793 conveyed the advowson, that of 1855 merely conveyed the right of the next presentation, which was all that the grantor could in any way be said to possess. The deed of 1793 was valid till it was impeached by the registration of another deed. The grantee under the second deed, therefore, took no title under that deed itself, but only a title by virtue of the statute. Whatever that title was, it dated only from the date of the registration. There is no case which makes the registration act retrospectively by way of relation. The Irish statute, 6 Anne, c. 2, does not compel registration, nor limit the time within which it is to take place, it merely gives an advantage to the person who does register. That advantage must accrue from the date of the register, and from that alone. What is the nature of that advantage was fully discussed by Lord Chief Justice *Bushe* in *Fury* v. *Smith* (2), where he said: "No one pretends that the non-registry of *A's* deed of 1815 made it the less *his* deed, or that it either took away the title of his grantee or restored a title to himself. There is no such effect produced by the *want* of registry. The *Registry Act* gives no privileges or advantages to the man who has parted with his estate by an unregistered deed; it leaves nothing in him to grant to anyone else; but was enacted for the advantage and protection of another person, that is, the person who, knowing nothing of the unregistered deed, deals with him for the property, thinking it still his; and if he be dishonest enough to take upon himself to transfer it a second time, the person who deals with him

(1) 6 C. B. (N.S.) 716. 5 Jur NS 1406

(2) 1 Huds. & Br. 735-753.

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takes nothing for his grant, for he had nothing to give; but, by registering the instrument, he acquires under the statute a priority to the unregistered deed, which, as to *him*, is then considered a *secret* and fraudulent conveyance. But until the *moment* of registry this effect does not take place" (1). Where it is not expressly required, the doctrine of relation is inapplicable, for, as Lord *Coke* says in *Butler* v. *Baker* (2), "relation is a fiction of law," and is only to be adopted in certain cases because of the necessity of the matter, and to advance justice, "but not to advance a wrong which the law abhorreth, or to defeat collateral acts which are lawful:" *Menvil's Case* (3). The same principle is stated in *Viner* (4), and in *Litchfield* v. *Ready* (5). There a mortgagee out of possession gave notice to the tenant who had entered into occupation since the mortgage, and, after such notice, the mortgagee who entered upon the land was not allowed to maintain trespass for the rents which had accrued due from the date of the mortgage, it being held that the doctrine of relation applied only between the disseisor and the disseisee. In that case *Sharpe* v. *Stallwood* (6) was considered, and the observations of Mr. Justice *Coltman* (7), which were supposed to point to a contrary doctrine, were explained by the particular facts of that case. The Defendants, therefore, are not entitled to refer back their deed from the time of its registration to the time of its execution. There was no title in the Defendants till the time of registration; they could not refer it back to the deed any more than a prebendary entering into possession of a prebend could refer back the right of presenting to a rectory, the advowson of which belonged to his office, to a vacancy which had occurred during the life of his predecessor, but had not been filled up by that predecessor: *Mirehouse* v. *Rennell* (8). And where a widow set aside, for a defect in the memorial, an annuity granted by her husband, it was held that the annuitant's right to recover the consideration money did not go back by relation to the time when an annuity was first granted: *Churchill* v. *Bertrand* (9). A bill of sale, fraudulent on the part of the person who made it, being in his presence *boná fide* assigned to a third person, such assignee was held entitled upon it as from the date of the assignment: *Morewood* v. *The South Yorkshire Railway Company* (1), such a conveyance not being absolutely void under the statute of Eliz., but only voidable as against creditors. So in *Perry* v. *Bowers* (2), a deed enrolled under the 27 Hen. 8, c. 16, was held to pass the estate only from the time of enrolment, though executed some time before. In *Stanger* v. *Miller* (3) a composition deed was held to take effect only from the date of the registration, and not of its execution, and the Court refused to give it a retrospective effect. In *Lawless* v. *Kenny* (4) the deed was executed on the 3rd of February and registered on the 5th; a judgment upon a bond previously made by the grantor was entered and docketed on the same 5th of February, and it was held not to have priority over the deed. And in *Fury* v. *Smith* (5) *A.* conveyed a term of years to *B.* by a deed; the deed was not registered. *B.* then conveyed to *C.*; this deed was registered. The sheriff, under writs against *A.* and *B.*, sold the term to *D.* The assignment by the sheriff to *D.* was registered. The unregistered assignment from *A.* to *B.* was held to prevail over the registered assignment to *D.*, for at the time of the seizure *B.* had nothing on him which the sheriff could seize.

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(1) The italics are in the original report.

(2) 3 Co. Rep. 29.

(3) 13 Ibid. 21.

(4) Vin. Abr. Relation C.

(5) 5 Ex. 939.

(6) 6 Scott, N. R. 715.

(7) Ibid. 729.

(8) 7 B. & C. 113; 1 Cl. & F. 527.

(9) 3 Q. B. 568.

From the language used by the Court in *Warburton* v. *Loveland* (6), it is clear that the deed of 1855 became valid as against the deed of 1793 only from the time of registration. No construction has ever been put on the Act to give a retroactive effect to a registered deed; and it can therefore only be treated as a deed validly and effectually executed on the day of registration. This rule was applied even with respect to costs under the *Irish Common Law Procedure Act*, 16 & 17 Vict. c. 113: *Ryan* v. *Landers* (7). There a Defendant in ejectment claimed under an unregistered lease, which was of a date subsequent to that under which the Plaintiff claimed, and which at the time of action brought was also unregistered. Before the trial the Plaintiff registered his lease, and thereon obtained verdict and judgment, but, on the application for costs, he was held entitled to costs only from the date of the registry under the 204th section of the Act of 1853, because the other title had not expired until that time.

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(1) 28 L. J. (Ex.) 114; 3 H. & N. 798.

(2) Sir T. Jones, 196.

(3) Law Rep. 1 Ex. 58. 11 Jur N.S. 1005

(4) 1 H. & Br. 377.

(5) Ibid. 735.

(6) Ibid. 623.

(7) 9 Ir. L. Rep. (N.S.) 487.

The title here was complete under the unregistered deed of 1793 till the registration of that of 1815 displaced it. A similar principle was adopted in *Johnston* v. *Stewart* (1). There ejectment was brought by a mortgagee. The Defendant relied on an outstanding title in an elegit creditor of the mortgagor upon a judgment prior to the mortgage, but the inquisition on the elegit bore date after the bringing of the ejectment, and only two days before the trial. A verdict was found for the Plaintiff. The Defendant moved to restrain him from entering judgment for the term, or issuing a *habere,* the title being shewn to be out of him at the time of the trial; but the Court refused to interfere until it should appear that the Plaintiff was proceeding to disturb the Defendant's possession, the Plaintiff being entitled to damages for the trespass on the day of the ouster laid in the declaration. That, again, is an authority against the supposition that where a title is created by an act of law it will, without express provision to that effect, operate as from an earlier period. And in *Shears* v. *Rogers* (2) Mr. Justice *Littledale* declared the same principle with regard to an assignment void under the 13 Eliz. c. 5, for he said: "The assignment was void as soon as the creditors claimed to treat it as such, though not until then." In *Tucker* v. *Webster* (3) the Defendant pleaded that the Plaintiff had been discharged under the *Insolvent Act*. Mr. Baron *Parke* said: "If the order was made before the commencement of the suit it should have been so averred; if since the plea, should have been to the farther maintenance of the action." In *Metcalfe* v. *Pulvertoft* (4) Vice-Chancellor *Plumer* adopted the same principle, and overruled a plea of purchase *pendente lite,* pleaded in bar of the whole suit saying "the suit is to be decided according to the state of things when it was instituted." In *Berrington* v. *Parkhurst* (5) it was held that the day of demise cannot be laid before the date of the actual entry made in order to avoid a fine. The plea here, in bar of the action, could not be supported by evi-

(1) 1 Smith & Batty 369.
(2) 3 B. & Ad. 362, 370.
(3) 1 Dowl. P. C. (N.S.) 960.
(4) 2 V. & B. 200, 204.
(5) Str. 1086.

dence that the supposed bar had arisen long after action brought, and just before the trial: *Tower* v. *Cameron* (1).

The second plea is bad in substance. The inducement is only an argumentative denial of the continuance of the Plaintiffs' title, and the traverse is only a traverse of a part of the count, which is not inconsistent with the Defendants' title, and is therefore immaterial.

In all real actions, where the Plaintiff is bound to state his title, the man who contests it is bound to state his; in *quare impedit* the rule is all the stronger, for both parties are actors; but the rule is general. It is thus stated by *Hobart* in *Colt* v. *The Bishop of Coventry and Lichfield* (2): "Of the form of pleading in law there is one reason common to other actions, wherever title is contained to the land in question, specially, which is, that the tenant shall never be received to counter plead, but he must convey himself, by his plea, a title to the land, and so avoid the Plaintiff's title alleged by traverse, or confessing and avoiding. But in the *quare impedit* there is a farther reason, for both Plaintiff and Defendant are actors, one against another; and therefore the Defendant shall have a writ to the Bishop, as well as the Plaintiff, which they cannot have without a title appearing to the Court. And, therefore, if the Defendant never appear, yet the Plaintiff must make a title for form's sake, and so must the Defendant, if the Plaintiff be nonsuit." And in the same way, in *Digby* v. *Fitzharbert* (3), Lord *Hobart* observes, "If a man will leave the general issue and controvert the title, he must make himself by some title of his own to do it; but yet that is not the principal part of his plea, but a formal inducement only .... You shall not fly upon my title, or forsake your own: you must recover by your own strength, and not by my weakness." And, again, in *Elvis* v. *The Archbishop of York*, it is said that (4), "though he be a possessor," which is explained to mean presentee after induction, "he must by the letter and meaning of the law, as well shew and defend his own right, as counterplead his adversary's." There are other similar passages, and in p. 321 he says, "The parson cannot plead that he is parson generally, but he must shew necessarily of whose presentation," and this shewing of whose presentation is material and traversable. Such was the form in *Tufton* v. *Temple* (1), of the plea of *Chamberlayne*, the clerk, who had been instituted and inducted; but who not merely protested the title of the other side, but alleged the title of his own patron, and the presentation and induction thereon. In *Foster* v. *Pretty* (2), it was held that title must be shewn beyond mere possession. In *Lister* v. *Crameel* (3), the clerk, in *quare impedit*, pleaded that before action brought he had been in for six months of the presentment of a stranger, *S. S.*: it was held that he ought to shew that *S. S.* had title. And in the *King* v. *Cotton* (4), it is said, "There ought to be a proper inducement to every traverse, to shew the matter contained in the traverse to be material; for, though the inducement to the traverse is not traversable generally, yet it ought to be such as, if true, will defeat the title of the other party, for otherwise the traverse amounts to a negative pregnant." *Viner's* Abridgment (5); and *Comyn* (6), were referred to. The plea is therefore bad as to the clerk, and both having joined in pleading, if it is bad as to one, it is bad as to both.

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(1) 6 East, 413, and see *Gowland* v. *Warren*, 1 Camp. 363.

(2) Hob. 162.

(3) Ibid. 103.

(4) Hob. 319.

The judgment on the demurrer is right. *Quare impedit* is not within the statute. It is not an "action," nor is it brought in any of the superior Courts of common law, for its commencement is not in the Common Pleas, but by original writ in Chancery. In no sense, therefore, is it within the words of the statute.

Mr. *Mellish* replied.

THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, this case is brought before your Lordships upon Error, from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Common Pleas in *Ireland* which awarded a *venire de novo.*

A preliminary objection was taken to the appeal being heard, on the ground that, after the judgment of the Court of Exchequer Chamber, the Plaintiff in the cause (the Defendant in Error) proceeded on the *venire de novo* to try the issues in fact; and that the Defendants in the cause (the Plaintiffs in Error) appeared at

(1) Vaugh. 5.
(2) Goldsb. 67.
(3) Noy. 30.
(4) Parker, 112-131.
(5) Traverse.
(6) Pleader, "*Quare Impedit*," 3. I. 9.

the trial, took exceptions to the evidence and to the direction of the Judge to the jury, and the jury again found a verdict for the Plaintiff. On the argument of the exceptions, the Court of Common Pleas gave judgment, and awarded a *venire de novo*. That the Plaintiff again proceeded to trial on the second *venire de novo*, and the Defendants again appeared; but the jurymen not agreeing were discharged without giving a verdict. That the Plaintiff proceeded to a fourth trial, at which the Defendants again appeared, and took exceptions to evidence, and to the ruling and charge of the Judge, and the jury again found a verdict for the Plaintiff.

It was objected that the Defendant, having appeared at three several trials of the issues in fact, after the first suggestion of Error upon the record, and a judgment of the Court of Exchequer Chamber, had waived their right to proceed in Error on that judgment, and were precluded from proceeding with the cause in this House.

This objection, after a short argument, was withdrawn; but it is impossible to pass by the proceedings upon which it was founded without notice. Even if the acquiescence of the Defendants raised a personal objection against them, I do not see how it was possible when the record was brought upon Error to this House, that your Lordships could do otherwise than decide the cause. I should have thought that when the 49th section of the Act of the 19th and 20th Vict. c. 102, allowed Error to be brought upon an award of a trial *de novo*, the bringing Error would have operated a stay of proceedings. But whether that is so or not, I am satisfied that, upon application to the Court, it would have prevented the wanton, useless, and unjustifiable litigation, in which the parties have thought proper to indulge themselves, at the cost of three unnecessary trials (1).

The questions upon the record which is brought before your Lordships, arise upon a demurrer to one of the pleas of the Plaintiffs in Error, and upon a bill of exceptions to the admission of evidence.

In a case of *quare impedit* it is necessary for the Plaintiff, in his declaration, to shew an original seisin in fee of the advowson, and a presentation in accordance with it. The declaration, accordingly, commences with an allegation that Sir *Clotworthy Skeffington*, Earl of *Massareene*, on the 17th of February, 1778, was seised in fee of the advowson in gross of the rectory of the church of *Killead*, in the county of *Antrim*, and that being so seised he afterwards, on the day and year aforesaid, presented to the said church, being then vacant, *John Clotworthy Skeffington*, who was admitted, instituted, and inducted into the same.

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(1) See *ante*, 396, n.

The Plaintiff then deduces his title from Sir *Clotworthy Skeffington*, Earl of *Massareene*, by grant of the 12th of June, 1793, to *William Whaley*, and states various subsequent dealings with the advowson until he became seised of it in fee under the will of *William Whaley*, made on the 20th of May, 1835. The declaration contains allegations that the rectory and church became vacant by the death of *John Clotworthy Skeffington*, and that it belonged to *William Whaley* to present a proper person to the rectory or church so vacant; but that *John* Earl of *Massareene* usurped upon *William Whaley*, and on the 8th of July, 1801, presented *Bernard O'Doran*, his clerk, who was admitted, instituted, and inducted. That afterwards the rectory and church became vacant by the death of the said *Bernard O'Doran*, and that it belonged to the said *William Whaley* to present a fit person to the rectory and church, but that *Chichester* Earl of *Massareene*, usurping upon *William Whaley*, on the 9th of November, 1815, presented *William George Macartney*, who was admitted, instituted, and inducted. And that on the 12th of November, 1858, the church became vacant by the death of the said *William George Macartney*, and that by reason of the premises it then belonged, and now belongs, to the Plaintiff to present a fit person to the said rectory and church; but that *John Skeffington* Viscount *Massareene, John Carlisle, Roger Bickerstaffe*, clerk, and the Bishop of *Down* and *Connor* and *Dromore*, unjustly disturb and hinder him.

The Defendants, Viscount *Massareene*, *John Carlisle*, and *Roger Bickerstaffe*, plead jointly, and by their second plea in bar say, that the Defendant, the Reverend *Roger Bickerstaffe*, is parson of the church, canonically imparsonated therein, upon the presentation and confirmation of the Defendants, Viscount *Massareene* and *John Carlisle*. That *Chichester* Earl of *Massareene* was, on the 29th of November, 1815, and from thence until his death, seised of the advowson in fee; and he being so seised, the church became vacant by the death of *Bernard O'Doran*, who had been incumbent thereof till his death; and thereupon *Chichester* Earl of *Massareene* rightfully presented to the rectory and church *William George Macartney* as his clerk, who upon this presentation was rightfully admitted, instituted, and inducted into the church. The plea then deduces the title to the advowson from *Chichester* Earl of *Massareene*, to *John* Viscount *Massareene*, and alleges that, by an indenture of the 16th of May, 1855, *John* Viscount *Massareene* granted to the Defendant, *John Carlisle*, the next presentation of the church. That *William George Macartney* died on the 12th of November, 1858, whereupon the church first became vacant after the execution of the said indenture; and that *John* Viscount *Massareene*, and *John Carlisle*, jointly and severally presented *Roger Bickerstaffe* to the Bishop of *Down*, *Connor*, and *Dromore*, being the ordinary; upon which presentation *Roger Bickerstaffe*, before the issuing of the writ of the Plaintiff, was duly admitted, instituted, and inducted into the said church. And the plea ends with a special traverse: "Without this, that Sir *Clotworthy Skeffington*, Earl of *Massareene*, in the declaration mentioned, presented *John Clotworthy Skeffington* to the said church; or that the said *John Clotworthy Skeffington* was, upon the presentation of *Clotworthy Skeffington*, Earl of *Massareene*, admitted, instituted, and inducted into the same, in manner and form as in the declaration alleged."

To this plea the Plaintiff demurred specially, and the Court of Common Pleas gave judgment for him that the plea was not sufficient in law.

Although the case is brought to the House only upon Error from the judgment of the Court of Exchequer Chamber as to the *venire de novo*, yet the record being before your Lordships, I apprehend it will be proper to dispose of every question of law which arises upon it, and therefore to decide upon the sufficiency of the second plea, on which the Court of Common Pleas has given judgment.

The rules of pleading in *quare impedit* are thus stated in the case of *Tufton* v. *Temple* (1): "In *a quare impedit* both Plaintiff and Defendant may be actors, and either have a writ to the Bishop as the right falls out to be. But it is not true that both are always actors in a *quare impedit*; for if the Defendant hath presented his clerk, and he be admitted, instituted, and inducted, before the *quare impedit* brought, the Defendant hath then no cause to have a writ to the Bishop for the doing of that which is already done; and consequently, in such a case, the Defendant is no actor, but a true Defendant. The Plaintiff, who is to recover that which he hath not, must shew a good title before he can recover, or he shall never avoid the Defendant's possession by shewing no title, or an insufficient one, which is the same with none."

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(1) Vaugh. 7.

It seems, however, that even after the Defendant's clerk has been presented and inducted, it is necessary for the Defendant, the patron, in pleading to state a title *pro formâ* in himself as an inducement to his traverse of some material part of the Plaintiffs' title; and such traverse must be of some part of the Plaintiffs' count, which is inconsistent with the Defendant's title; and which, being found against the Plaintiff, destroys his title; and, as was said by Chief Baron *Parker* (1), according to the proper rule of pleading, there ought to be a proper inducement to every traverse to shew the matter contained in the traverse to be material. Now the plea in question offends against both these rules: for as to the first, the traverse is not of some part of the Plaintiffs' count which is inconsistent with the Defendant's title, for the Earl of *Massareene* may have presented *John Clotworthy Skeffington* to the church, and yet the Defendant may have the title which he alleges in his plea; and, as to the rule laid down by Chief Baron *Parker*, the inducement and traverse in the plea have no relation to each other, the inducement being an argumentative denial of the continuance of the Plaintiffs' title, and the traverse a direct denial of a fact connected with the origin and foundation of the title. The plea, therefore, is bad on special demurrer.

But the Defendants contend that special demurrers have been abolished in *Ireland* by the 81st section of the *Common Law Procedure Amendment Act*, 1853, and that consequently, if the plea is good on general demurrer, it is sufficient. On the other hand, it is said that this section of the Act does not extend to actions of *quare impedit*, though it is not denied that other sections apply to actions of this description. By the interpretation clause, sect. 4, the word "action" is to be understood to mean any personal action.

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(1) Parker, 131, 132.

If the clause in question contains the word "action" with respect to special demurrers, it will of course be restricted in its application according to the expressed intention of the Legislature. But the word "action" is not to be found in the part of the 81st section which relates to them. It enacts in the most general and comprehensive language, that no objection by way of general or special demurrer for formal matter only shall be allowed, and no pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer, and when issue shall be joined on any demurrer, the Court shall proceed and give judgment according to the very right of the cause, without regarding any imperfection, omission, defect, or lack of form.

There is no reason why the generality of this section should be limited. It must rather be assumed to have been the intention of the Legislature that it should apply to every case, from the avoidance of the use of the word "action," which would have confined this part of the clause to personal actions.

The plea then being only open to general demurrer, it appears to me to be good in substance. It alleges a title in the Defendants which, although not paramount to the Plaintiff's title, yet is wholly inconsistent with its continuance. It shews that the church is full, and, therefore, the Defendants are at liberty to deny any of the Plaintiff's averments in his declaration, which it was necessary for him to prove as part of his title; and whether this is done by express denial, or by special traverse, is mere form, and wholly immaterial. It was essential to the Plaintiff's title that he should prove not only the seisin in fee of *Clotworthy Skeffington* Earl of *Massareene*, but also the presentation of *John Clotworthy Skeffington*. And if he had taken issue upon the traverse, and it had been found against him, it would have entirely destroyed his title.

It was argued, however, that the patron and clerk having joined in their pleadings, if the plea is bad for either of them it is bad for both. And it was said that the case of the *Queen* v. *Bishop of Cor*[illegible] determined that the plea was bad for the patron, and [illegible] d Chief Justice *Tindal*, in the case of the *Bishop of Meath* v. [illegible] *arquis of Winchester* (2), had shewn that it was bad for the incumbent.

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(1) 11 Ir. C. L. Rep. [illegible]

(2) 4 Cl. & F. 445.

In the first of these cases Chief Justice *Doherty* said, "We conceive it to be the result of the authorities to shew, that in order to enable the Defendants to traverse the title of the Plaintiff, they are bound, even though in possession, to put forward *pro formâ* some title in the patron inconsistent with that laid in the declaration."

This course has been followed in the plea in question, for an averment of a seisin in fee in *Chichester* Earl of *Massareene*, in 1815, is inconsistent with the continuance of the Plaintiff's title, commencing in 1793.

Lord Chief Justice *Tindal*, in the *Bishop of Meath* v. *The Marquis of Winchester*, said (1): "It is clearly established that neither the clerk nor ordinary, in that character, could counterplead the Plaintiff's title at common law, for neither of them had any interest in the patronage; and under the statute 25 Edw. 3, c. 7, the incumbent (as possessor when presented and instituted) could not counterplead the Plaintiff's title without maintaining his own title and that of his patron, on which his own depends."

This, I think, must be understood where the *quare impedit* is brought against the incumbent alone. For it would be strange to hold, where the patron and clerk are co-Defendants, and the church is full (the patron, according to the authorities, not being compelled to shew any title, or at least being only required to state a *pro formâ* title) that the clerk, who can know nothing about the title, should be put to a proof from which the patron is exempt. The more reasonable view is, that, as it is the patron's right which is in issue, what is a good plea for him is good also for the clerk, who must stand or fall with his patron.

I think that the judgment of the Court of Common Pleas was wrong upon the demurrer to the second plea, and that judgment ought to have been given for the Defendants.

The Error from the Court of Exchequer Chamber, which brought the record to this House, arises out of the eighth plea, which states that no memorial of the indenture of the 12th of June, 1793, by which *Clotworthy Sheffington*, Earl of *Massareene*, granted the advowson in fee to *William Whaley*, was ever registered pursuant to the statutes relating to the registration of deeds concerning lands, tene-

(1) 4 Cl. & F. 556.

ments, and hereditaments in *Ireland*, and that the deed of the 16th of May, 1855, by which *John* Viscount *Massareene* granted the next presentation of the church of *Killead* to the Defendant, *John Carlisle*, was duly registered pursuant to the statutes in that case made and provided. The Plaintiff, in his replication to this plea, takes issue upon the registration of the Defendant's deed. The jury found that the indenture of the 16th of May, 1855, was duly registered on the 9th of January, 1860, which was after the commencement of the action, but before the filing of the pleas. The Judge, after objection by the counsel for the Plaintiff, admitted the deed of 1855 thus registered in evidence, and directed the jury to find that a memorial of the indenture of the 16th of May, 1855, was duly registered on the 9th of January, 1860.

To this direction the Plaintiff tendered a bill of exceptions. The Court of Common Pleas allowed the exception, and awarded a *venire de novo*, and, on Error to the Exchequer Chamber, this judgment was affirmed.

The question upon Error from this judgment is, whether the production of a deed registered after the commencement of the action, but before plea pleaded, is or is not an answer to the title of the Plaintiff, founded upon the deed of the 12th of June, 1793, which was never registered.

The *Irish Registration Act*, 6 Anne, c. 2, by the fourth section enacts, that every deed or conveyance, a memorial whereof shall be duly registered according to the directions in the Act, shall be deemed good and effectual both in law and equity, according to the priority of time of registering such memorials, against all and and every other deed, conveyance, or disposition. And, by the fifth section, every deed or conveyance, not registered, of any land, &c., contained in a registered deed, shall be deemed fraudulent and void as against such registered deed or conveyance. Various authorities were cited to shew that the registration of the deed of 1815 did not make that deed relate back to any period anterior to such registration.

The argument for the Plaintiff is in this respect well founded, for I agree with Lord *Redesdale's* opinion in *Latouche* v. *Lord Dunsany* (1), that the meaning of the Act is, that a deed shall

(1) 1 Sch. & Lef. 160.

have effect only from the time of its registration, the words of the 4th section of the Act being, that the deed "shall be deemed and taken as good and effectual, &c., according to the priority of time of registering such memorial."

The real question is, whether the plea of the Defendants, that a memorial of the deed was duly registered at a time mentioned under a videlicet, amounts to an averment that the memorial was registered before the commencement of the action; or whether, in support of that averment, it was not sufficient to prove that the deed had been registered at the time of the plea pleaded.

It was argued that the averment must be taken impliedly to mean that the memorial was registered before the commencement of the action, because otherwise it would be no answer. But this is begging the whole question; for the argument amounts to this, that when once an action has been commenced upon an unregistered deed, no deed subsequently registered can prevail against it. I take it to be clear, that when the deed of the 16th of May, 1855, was registered, it might have been pleaded in bar of the further maintenance of the action; and after verdict for the Defendants upon this plea, according to the case of *Allen* v. *Hopkins* (1), they were entitled to judgment. Mr. *Whaley's* counsel cited the case of *Ryan* v. *Landers* (2), where a Defendant in ejectment, whose title depended upon an unregistered lease subsequent in date to an unregistered lease upon which the Plaintiff's action was founded, registered his lease after the commencement of the action, and it was held that the Plaintiff was entitled to a verdict and judgment for his costs. But this case was decided upon the 204th section of the *Irish Common Law Procedure Act*, 1853, which enacts, that "in case the title of the Plaintiff (in ejectment) shall appear to have existed, as alleged in the writ, at the time of service thereof, but it shall appear to have expired before the time of trial, the Plaintiff shall, notwithstanding, be entitled to a verdict, according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit." And the Court held that by the registration of the Defendants' lease, the Plaintiff's title, depending upon an unregistered lease, had expired, which makes

(1) 13 M. & W. 94.

(2) 9 Ir. L. Rep. (N.S.) 487.

this case an authority rather in favour of the Defendants than of the Plaintiff.

I think that the Court of Exchequer Chamber, instead of affirming the judgment of the Court of Common Pleas, awarding a *venire de novo*, ought to have reversed the judgment, and to have given judgment for the Defendants (then, as now, Plaintiffs in Error) on the verdict of the jury on the issue joined upon the eighth plea; and I advise your Lordships that the judgments of the Court of Common Pleas, and of the Court of Exchequer Chamber, ought to be reversed, and that judgment ought to be entered for the Plaintiffs in Error upon the demurrer to the second plea, and also upon the verdict of the jury on the issue raised upon the eighth plea.

LORD CRANWORTH:—

My Lords, I concur with my noble and learned friend, that we ought to hold the second plea to be a good plea; that is, to be a good plea on general demurrer. It states seisin in fee of the advowson in *Chichester* Earl of *Massareene*, that the church became vacant by the death of the clerk *O'Doran*, and thereupon states the presentation and so on of *Macartney;* and then traces the title to the advowson from *Chichester* Earl of *Massareene* to the Defendant, *John* Earl of *Massareene*. It states the death of *Macartney*, and the presentation of *Bickerstaffe*, and his institution, induction, and so on. Then it specially traverses the presentation by *Clotworthy* Earl of *Massareene*, which was a necessary averment in the declaration.

I have said that this was good upon general demurrer. I do not, however, omit to notice that the demurrer here is a special demurrer, but having attended to the language of the 81st section of the 16 & 17 Vict. c. 113 (the *Common Law Procedure Act* for *Ireland*) [His Lordship read the words of the section], I think that special demurrers are done away with in proceedings of *quare impedit*, as well as in personal actions.

The preamble of the statute refers to the procedure generally in the superior Courts of common law; and in order to advance the remedy the Courts ought, if possible, so to construe the Act as to make it applicable to all cases where the pleadings were before

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the Act dilatory, prolix, and of unnecessary length. That certainly was the case in *quare impedit.* But the supposed objection arises from this, that in the fourth section, which is the interpretation section, the word "action," it is enacted, shall be understood to mean, "any personal action brought in any of the said Courts." And there can be no doubt, on looking through the Act, that the great object of the Legislature was to regulate ordinary actions—personal actions. But that difficulty has been got over in the Courts in *Ireland* just in the same way as in the Courts in this country. In the case of *Marshall* v. *The Bishop of Exeter*, which was decided in the Court of Common Pleas (1), although there just the same difficulty arose from the definition of the word "action," it was there contended that inasmuch as the section allowing the parties to plead did not mention the word "action," it was therefore necessarily confined to personal actions, but the Court held that by reason of the generality of the preamble, that section must be held to apply to *quare impedit,* although it was not a personal action. I think, just upon the same principle, the *Irish Common Law Procedure Act* ought to be construed so as to advance the remedy intended to be applied by the statute to existing evils, and that wherever the evil contemplated by the preamble has to be dealt with, there the words should be made to apply to it, as well as to what are actions within the definition of the interpretation clause, namely, personal actions.

Sect. 81 applies in terms to all pleadings. I see nothing in that section, or at all events in the first half of it, to confine it to personal actions; the latter half is clearly confined to actions commenced by summons and plaint; but this does not apply to the first half. Therefore I think we may fairly range the clause so as to make that part of it which is not made to apply to personal actions apply to all pleadings which are unnecessarily prolix and lengthy.

There are many other provisions in the statute which are clearly applicable to all actions whatever. The 18th section is a section whereby either party may call upon the other by notice to admit any document or copy thereof (allowing just exceptions), thus making that enactment with which your Lordships are now so

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(1) 6 C. B. (N. S.) 716, 5 Jur N.S. 1406.

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familiar clearly extend to *quare impedit,* as well as to other proceedings. So, again, with regard to bills of exceptions in the 121st section may be referred to. And so certainly as to writs of Error, for if it does not apply to writs of Error the whole proceedings here are wrong, because under the old form, independently of that statute, this case could only be brought before your Lordships' House under a writ of Error. There is here no writ of error at all. It has been treated only as a proceeding in the cause, and it has no doubt been rightly so dealt with.

Treating this as a general demurrer, I think the plea is clearly good. It states the title in Lord *Massareene* and *Carlisle,* and traverses (though in an informal manner) a material allegation in the declaration. It appears to me, therefore, that this is good as a general demurrer, although it is in form a special demurrer. The Legislature has forbidden any Court to deal with a special demurrer otherwise than as a general demurrer. So much with regard to the second plea.

I think further that the direction given at the trial on the issue raised by the replication to the eighth plea was right; and therefore that the exception taken to that direction cannot be sustained. I may observe that this is all immaterial in my view, except as to the question of costs, as to that part of the record; because, if the second plea is good, there is an end of the case. But I concur with my noble and learned friend in thinking that the direction at the trial was quite correct. The eighth plea, admitting the title of *Clotworthy* Earl of *Massareene,* derives the title from him to the Defendant, *John* Earl of *Massareene,* in a course of descent, which would be good but for the deed of the 12th of June, 1793, and that deed was never registered, as required by the *Irish Registry Acts.* The plea then states a deed of the 16th of May, 1855, and avers that it was duly registered. The replication is, that it was not duly registered, and issue is joined. There is clear evidence that it was in fact registered on the 9th of January, 1860. The learned Judge ruled that this was good evidence in support of the plea, and the jury found accordingly. Upon which the exceptions were taken.

Now, was that a right direction or not? The action was commenced in Trinity Term, 1859. The registration took place after

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the commencement of the action, but before plea pleaded. In my opinion that was perfectly sufficient. The registration cannot be said to give any new effect to the deed registered. Its operation is to make the unregistered deed void. The plea truly states that a memorial was duly registered. No particular time is rendered necessary to produce the effect intended by the Act when the deed is unregistered. The unregistered deed is made void as against the subsequent registered deed, and the deed is duly registered if the exigencies of the Act have been attended to. It is then so registered as to enable the parties to oust the prior unregistered deed. Registration is no part of the conveyance, and therefore the analogies relied upon as to feoffment and livery, surrender and admittance, bargain and sale, and inrolment, are all inapplicable. The doctrine of relation, too, is not applicable, because registration does not perfect the deed registered, but avoids the previous deed.

I am unwilling to quit this case without saying that much of the learning which was displayed at the bar on the subject of pleadings in *quare impedit* is, in my opinion, inapplicable to a case like the present. When a church is vacant by the death of the incumbent, and two conflicting claimants allege a right to present, but the bishop refuses to present the clerk of either until the right to present has been established, both claimants are necessarily actors. Each of them insists on the right to call on the bishop to institute his presentee. And, therefore, when one of them brings his action of *quare impedit*, and states in the manner required by law his title to present, it is obviously not sufficient that the Defendant should merely so plead as to put in issue the Plaintiff's title. However bad that title may be, it does not follow that the Defendant has a right to call on the bishop to admit his clerk merely because the Plaintiff has not shewn a title to present his. In such a case both parties are actors, and hence have arisen many of the rules of pleading in *quare impedit*. But when the bishop has already accepted the clerk of one of the competing claimants of the right of presentation, and that clerk has been duly instituted and inducted, the Defendant is no longer an actor. He seeks nothing from the bishop. His title to present has been acted on. His clerk is in possession, and then the ordinary principle must prevail, that the Plaintiff, seeking to disturb a party in possession,

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must succeed by the strength of his own title, not by the weakness of that of his adversary. It follows that the Defendant must prevail if he successfully traverses any material allegation of the declaration. All this is so clearly put in Lord Chief Justice *Vaughan's* report of the case of *Tufton* v. *Temple* (1), that I need do no more than refer to that book, the reports in which, I may add, are in general very satisfactory.

LORD COLONSAY:—

My Lords, I have nothing to add to what has been stated. I entirely concur in the opinion of my noble and learned friends.

Judgments of the Court of Common Pleas and of the Court of Exchequer Chamber in Ireland reversed: Judgment to be entered for the Plaintiffs in Error, as well upon the demurrer to the second plea, as upon the verdict of the jury upon the issue raised by the eighth plea.

Attorneys for the Plaintiffs in Error: *C. J. & H. Shollbridge.*
Attorney for the Defendant in Error: *P. B. Sharkey.*

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June 21, 28.

THE RIGHT HON. LORD DELAMERE AND OTHERS, TRUSTEES OF THE RIVER WEAVER NAVIGATION } PLAINTIFFS IN ERROR;

AND

THE QUEEN, ON THE PROSECUTION OF RICHARD EVANS . . . . } DEFENDANT IN ERROR.

Canal Trustees—Mandamus—Pleading.

If there is in a writ of mandamus a defective statement of a valid claim, but that statement renders it necessary to establish facts which, if established, would support the claim in the writ, the defectiveness, though it might be fatal on demurrer, is cured by the verdict.

A landowner complained in his writ of mandamus that the Defendants were the trustees of a navigation—that there were a lock, weir, and clows

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(1) Vaugh. 7.

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(sluices) near his land, that they were under the management of the trustees, that owing to heavy rains the water had greatly risen, that the clows were not raised to such a height to let off the water as they ought to have been, and, but for possible damage to works of the trustees in another place, would have been, whereby he suffered damage; but he did not allege that the effect of the lock, weir, and clows, was to raise the water higher than it would have risen had they not existed. The issue on the return and pleadings was, whether the damage was occasioned on account of the navigation:—

Held, that the allegations in the writ, though they might have been insufficient on demurrer, were, after verdict, sufficient to warrant judgment for the Prosecutor.

THE Prosecutor was the owner of certain salt mines, situated on the banks of the river *Weaver*, near *Wharton*, in *Cheshire*. The navigation of the river *Weaver* was, by various Acts of Parliament, vested in trustees. The first of these Acts was the 7 Geo. 1, c. 10. There were two other Acts relating to this subject, the 33 Geo. 2, c. 49, and the 10 Geo. 4, c. 70. All three were declared to be public Acts. The Prosecutor complained of an injury done to his salt works by an overflow of the river *Weaver*, which had occurred on the 6th and 7th of December, 1860; and he claimed, under the 33 Geo. 2, c. 49, s. 13 (1), to be entitled to compensation in respect thereof. He obtained a mandamus directed to the trustees, commanding them to issue a warrant in the form required by the 10 Geo. 4, c. 70, for the purpose of summoning a jury to assess the amount of compensation. The mandamus set forth the Acts of Parliament, and stated that the Prosecutor was the lessee and occupier of certain salt works, situated on the banks of the river, above a certain place called *Newbridge*, where there were, at the time of the overflow, a lock and weir and clows (2), through which clows, when raised, the water of the said river could be let off and escape; that these were, by virtue of the Acts, under the control and superintendence of the trustees; that there was a lock, four or five miles below *Newbridge*, called *Hunt's Lock*, and that works to improve the navigation were there in progress and course of construction; that on the 6th and 7th of December, 1860, owing to heavy rains, the water above *Newbridge*, in front of the Prosecutor's land, had risen greatly in height, and the works at *Hunt's Lock* were in danger if the clows at *Newbridge* were raised, and the water there allowed to flow off; that the said clows were not raised to such a height as they might, and ought, and would have been, except for the said works at *Hunt's Lock*, and thereby the Prosecutor's works and premises were injured—and by reason of the flooding, and on account of the navigation, the Prosecutor sustained great damage, &c. The mandamus then alleged that the proper proceedings, as required by the 10 Geo. 4, c. 70, had been taken, and the trustees were commanded to issue their warrant.

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(1) The 33 Geo. 2, c. xlix. s. 13, enacted, "That if at any time hereafter any person shall sustain any damage in his lands, tenements, hereditaments, or property, by reason of the said navigation, or by turning, diverting, or lowering the stream thereof, or by not cleansing the same, or by turning or diverting any other streams or brooks that shall be brought into the same, or by reason of any works made or to be made for carrying on the said navigation, or by any other act, neglect, or default of the workmen employed thereon, or by any other ways or means not hereby otherwise provided for, in every such case such damages shall from time to time be settled, ascertained, and determined in such manner as the other damages hereinbefore-mentioned are provided for." The 10 Geo. 4, c. lxx. settled the form of proceeding.

(2) Sluices.

The trustees made a return, in the first paragraph of which they alleged that the damage complained of was occasioned by "a great and sudden flood, and not by any act, matter, or thing, done or omitted to be done by the trustees," &c. Secondly, "that every act, matter, and thing was done, and every care and precaution taken by the trustees, for preventing the damage, which could be done or taken consistently with the safety of the works of the navigation, and of the persons and property of the residents on and near to the banks thereof, and that nothing which could have been done, consistently with these objects, in raising the said clows to a greater height, or to a greater extent, would have prevented the overflow." Thirdly, "that the clows were raised to as great a height as they could or ought to have been raised, regard being had to the due maintenance of the navigation, and the safety of the vessels in, and of the works on and adjacent to the river." Fourthly, "that if the clows had been raised to their full height there would have been no appreciable difference in the height of the water in front of the Prosecutor's land, nor consequently in the overflow thereof." Fifthly, that on the said days "there was at *Newbridge* a considerably larger sectional area for the flow and escape of the water than there was at a point of the river above *Newbridge* and below the Prosecutor's premises." Sixthly, "that the banks of the river have been from time to time encroached upon by the owners and occupiers of property and salt works, and that at a certain point between *Newbridge* and the works of the Prosecutor the width of the river had been thereby materially contracted, and that the water was penned back and overflowed the land of the Prosecutor by reason of the narrowness of the river at the point aforesaid." Seventhly, that "the Prosecutor had not sustained damage in his land," &c., "by reason or on account of the navigation, or of the construction of any works connected therewith, or of the maintaining the navigation, or of the neglect of the servants of the trustees in execution of the powers and provisions of the said Acts of Parliament; and that he was not, under the provisions of the said Acts, entitled to claim compensation."

Issues were taken on the first, fourth, fifth, sixth and seventh paragraphs of this return. The second and third paragraphs were left untraversed. The Prosecutor specially pleaded as to the fifth paragraph, that at the time of the overflow a great part of the water was penned back and prevented, at *Newbridge*, from escaping and flowing into the river by the clows, and owing to their not being raised to such a height as they might and ought to have been, and would have been, except for the new works at *Hunt's Lock*. He also demurred to the whole return.

The issues of fact were tried at *Chester*, before Mr. Justice *Crompton*, in the Summer Assizes, 1862, and all of them were found in favour of the Crown. A rule nisi to arrest the judgment was afterwards obtained in the Court of Queen's Bench, and was, upon argument, made absolute, the Court being of opinion that on the writ and the untraversed paragraphs of the return there was no sufficient statement of a case to entitle the Prosecutor to compensation (1). This decision was, on the 12th of May, 1865, reversed in the Exchequer Chamber (2) (*diss.* Lord Chief Baron *Pollock*).

The present proceeding in Error was then taken.

Mr. *Mellish*, Q.C., and Mr. *McIntyre*, for the Plaintiffs in Error:—

The ground of the decision of the Court of Queen's Bench was, that the prosecutor was not entitled to compensation unless it

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(1) 12 W. R. 707.

(2) Not reported.

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appeared that the water, of the overflow of which he complained, had been raised to overflowing by the works of the trustees. That was a correct view of the case. If the flood had been such that it would have caused the damage, though there had been no works, it was clear that no title to compensation on account of the works could arise. The Court of Exchequer Chamber thought that it might be collected from the statement that the works had caused the damage. There is no part of the statement which justifies that opinion, while in the return there is a distinct allegation that every act was done, and every precaution taken, for preventing the injury from the flood which could be done or taken consistently with the safety of the navigation, and of the persons and property of the residents in the neighbourhood. It was farther stated in the return that the clows were raised to as great a height as they could, regard being had to the safety of the navigation and of the vessels on and the works adjacent to the river. Both these allegations in the return were untraversed. They were therefore admitted to be true, and they formed a complete answer to the demand for compensation. If the trustees could not do otherwise than what they had done, without injuring the navigation which they were appointed to maintain, and without damaging the property of other persons whose property they were bound to protect, it was impossible to contend that they could be liable to this demand for compensation. In addition to this, there was nothing to shew that there would have been less damage if there had been no works at all. The natural state of things had not been altered by the works, so as to occasion the damage, and the Prosecutor had not been damnified by those works, but by the natural flood of the river. [THE LORD CHANCELLOR referred to the provision which required the trustees to make "satisfaction in the manner thereinafter mentioned to the owners and occupiers" of property "for any damage that might happen or be occasioned to" such property "for or on account of the said navigation." Is not this a damage within those words? It was for the protection of the works that the clows had not been raised to a greater height.] That was only a part of the reason; the other, and equally important part, was to save from damage the property of other people. [THE LORD CHANCELLOR:—Does it not follow, from the above words, that if the damage is occasioned by the works it must be compensated?] But the damage was not so occasioned by the works as to create any liability. The general words now quoted are explained by another provision, which shews that the damage intended to be compensated must be damage not only occasioned by the works, but by a particular mode of working. That provision says, that "if at any time a person should sustain damage in his land," &c., "by reason of the navigation, either by raising the water to be used in such navigation, or by turning, or diverting, or lowering the stream thereof." The trustees had not done any one of these things, and so had not brought themselves within the operation of the clause which required compensation to be given. If there had not been any works at all, the damage from the storm would have been just the same as it was. The trustees could not, because they had made works, be held liable to afford compensation for damage which would have occurred, whether there had been any works or not. A liability of that sort could not be set up as a matter of law. To maintain the mandamus the damage must be distinctly attributed to the works, which had not been, and could not be, done here. Neither was it pretended that the trustees had so used the works as to occasion damage. There was no charge of negligence against them or their servants. The claim here really was for not having so used the works, even to the danger of the works themselves, and of the neighbouring proprietors, as to save the Prosecutor from damage brought about by purely natural causes. Such a claim could not be supported.

Mr. *Grove*, Q.C., and Mr. *H. Giffard*, Q.C., for the Respondent:—

The clows were a part of the navigation works, and if they had been raised up higher so as to allow the water to flow off, this damage to the Prosecutor's salt works would not have occurred. That was the finding of the jury. The judgment of the Court of Queen's Bench proceeded on the erroneous assumption that there ought to have been a distinct allegation of a breach of duty on the part of the trustees. If that had been so, the proper remedy would have been by action for damages, not by a proceeding under the statute: *Clothier* v. *Webster* (1). The third paragraph of the return admitted the whole case when it set forth that the clows were raised to as great a height as they could, regard being had to the safety of the navigation. That shewed that the damage did arise from their not being raised sufficiently high to protect the Prosecutor's works, and that damage to him being occasioned by care for the navigation, it was properly described as occasioned on account of the navigation, and the case was thus brought within the very words of the Act of Geo. 2, and the Prosecutor was entitled to compensation. The jury, too, found as a fact that it was by reason of the navigation that the Prosecutor sustained damage. The burden lay on the trustees to shew that the damage did not arise from their works. They had not done so, for all the issues of fact were found against them. All that the Prosecutor was required to do was to allege that the damage had been occasioned by the works described in the Act, and having done so, he became entitled to compensation.

The untraversed portions of the return were immaterial. It might be admitted that the trustees had done their duty, and done it without negligence, but if, in doing their duty, they did that which was necessary for the navigation, or, because of the necessities of the navigation, omitted to do a particular thing, the doing of which, or the omission to do which, occasioned damage to a neighbouring owner, the Act gave him a title to compensation.

Mr. *Mellish* replied.

June 28. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, upon this appeal from the judgment of the Court of Exchequer Chamber the question is, whether, upon the whole record, the Prosecutor or the Plaintiffs in Error are entitled to your Lordships' judgment.

The claim of the Prosecutor to compensation arises upon the 13th section of the Act of 33 Geo. 2, c. xlix. which enacts:—[His Lordship read it. See *ante*, p. 420].

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(1) 10 W. R. 624; 31 L. J. (C. P.) 316; 12 C. B. (N.S.) 790.

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Does it sufficiently appear upon the whole record that the damage sustained in the lands of the Prosecutor was by reason of the navigation? It was not necessary for the Prosecutor to allege any breach of duty on the part of the trustees. The trustees are empowered by their Act to make the river *Weaver* navigable, and for that purpose to make (amongst other things) such and so many sluices, locks, weirs, pens for water, dams, and such works and conveniences for the purpose of making and preserving the navigation, as they shall think fit. If in the lawful exercise of these powers damage occurs, the party sustaining it is entitled to compensation.

It is said on behalf of the Plaintiffs in Error, that the writ of mandamus does not shew that the works of the trustees occasioned the overflow on the Prosecutor's lands. Perhaps it is correct to say that this is not explicitly averred, although it may be inferred from the averments which are made—for it is alleged [His Lordship read the allegation made].

It appears to me that, upon the face of the writ, there is a claim defectively stated, and not a statement of a defective claim, and that it is sufficiently to be collected that the lock and weir and clows were constructed for the purposes of the navigation; that the lock and weir kept up the water, and that the clows were for the very purpose of letting the water escape when it was raised above the weir.

If the allegations in the writ of mandamus were insufficient, the Plaintiffs in Error might have moved to quash the writ, even after their return to it, as appears from the cases of *Rex* v. *The Margate Pier Company* (1), and *Rex* v. *The Bristol Dock Company* (2). Instead of doing so, they not only allowed pleas to be filed, and issues to be raised upon the return, but they proceeded to trial; and a verdict was given against them.

That verdict found: "That the flooding and overflow of his lands, premises, and salt works mentioned in the said writ, and the damage consequent thereon, were not occasioned by a great and sudden flood, as in the said return alleged, but were occasioned by

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(1) 3 B. & Al. 220, overruling *Rex* v. *The Mayor of York*, 5 T. R. 66, and see n. (*a*) of the Reporter, Ibid. 74; and see also *Clarke* v. *Leicestershire and Northamptonshire Canal Company*, 6 Q. B. 898.

(2) 6 B. & C. 181, 190.

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reason of the acts, matters, and things of the trustees of the said *River Weaver Navigation*, their servants or workmen, and on account of the said navigation, as in the said writ is alleged" and set forth. Also that the Prosecutor "has sustained damage in his said land, premises, and salt works, by reason and on account of the said navigation, and of the construction of works connected therewith, and of the maintaining of the said navigation, and of the execution by the said trustees of the powers and provisions of the said Acts of Parliament, some or one of them, in the manner alleged in the said writ."

Now, suppose Mr. Justice *Blackburn* to have been right in saying, "If the allegation had shewn that the lock and weir were part of the works made by the navigation under their Act of Parliament, and that the effect of them was to dam back the river more than it otherwise would have been, and that in consequence of having erected the works, the lock and the weir, in times of flood the water was dammed back more than it otherwise would have been, and, consequently, had come over the Plaintiff's land, I should have thought it was a case for compensation;" it must be assumed that the Judge told the jurors what it was requisite for them to find in order to entitle the Prosecutor to their verdict; and they having found as they have done, the rule, which is clearly stated, and for which many authorities are vouched in the note to *Stennel* v. *Hogg* (1) applies, that "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict, by the common law."

Now the issue joined between the parties was, whether the damage sustained by the Prosecutor was "by reason and on account of the navigation and of the construction of works connected therewith." The Judge must be assumed to have told the jurors that unless they found that the works of the navigation had raised the water (which the trustees would then be bound in case of flood to let off), and that the overflowing of the water upon the lands of the Prosecutor was occasioned by the clows not being raised sufficiently high for the purpose, the Prosecutor was not entitled to compensation. Whatever opinion, therefore, I might have entertained as to the sufficiency of the writ of mandamus in itself, or taken with the untraversed part of the return, I have no doubt that any defective or imperfect statement which it may be supposed to contain is cured by the finding of the jury, and that the Prosecutor is, upon the whole record, entitled to judgment. I therefore suggest to your Lordships that the judgment of the Court of Exchequer Chamber ought to be affirmed.

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(1) 1 Saund. 228, n. (1).

LORD CRANWORTH:—

My Lords, I have come to the same conclusion as my noble and learned friend, though, I confess, not until after very considerable doubt. Had the matter arisen not after verdict, but upon the sufficiency of the writ, I certainly should have come to the conclusion that there was no sufficient statement upon the writ to warrant any proceeding, and that the writ might have been quashed. But I concur with my noble and learned friend in thinking that that is, happily for the ends of justice, cured by the verdict. The rule of law which makes the verdict conclusive, if there be anything in it which could warrant such a finding, is a most wholesome rule: and I am not at all sorry that it is applicable in the present case. The grounds upon which the Plaintiff rests his claim to compensation are as follows:—He states that his lands are situated on the banks of the river above *Newbridge*, at which spot there are a lock, a weir, and clows, through which clows, when raised, the water can escape; that the said weir, lock, and clows are under the management of the trustees of the navigation; that on the 6th of December, 1860, the water above *Newbridge* had risen greatly in height owing to the heavy rains; that the clows were not raised to such a height as they ought to have been, and that on the 7th of December the water above *Newbridge* overflowed its banks on the lands of Mr. *Evans*, doing to them considerable damage; and he states that by reason of such overflow he sustained considerable damage on account of the navigation.

My Lords, I confess that if the question had been whether that was a sufficient statement that the Plaintiff was entitled to compensation against the trustees for the damage caused to his lands by this overflow, if it had arisen barely and nakedly upon the sufficiency of the allegation, I should have had very great doubt; the strong leaning of my opinion is, that it would not have been sufficient, because although the weir and clows, or, at least, certainly the lock and weir, were made by the trustees, there is no allegation that the effect of the lock and weir was to raise the water above *Newbridge* at all higher than it would have been if no such works had existed. The only way in which that is supplied is, that the writ states that the trustees, having the control of the weir and of the clows, did not raise the clows so high as they ought to have raised them; and that by reason of the overflow the Prosecutor was injured on account of the navigation. Upon such a state of the record there being a return stating, among other things, "that the said *Richard Evans*, junior, has not sustained damage in his land, premises, and salt works by reason or on account of the navigation, or of the construction of any works connected therewith," to that there was a plea that he had "sustained damage in his land, premises, and salt works by reason and on account of the navigation, and of the construction of works connected therewith."

Now, my Lords, when that case came down to be tried upon the issue so joined, it was the duty of the Judge to tell the jurors they ought not to find that the Prosecutor was damaged by reason of the navigation, or works connected therewith, unless they were satisfied that those works had so raised the water that it was above the level at which the clows might have let it off if they had been raised. I consider that without such a direction the jurors could not have found as they did. They have found that he was injured by the navigation. They have thereby impliedly found that the works of the navigation raised the water above *Newbridge* to a height which caused the damage, and that that might have been obviated by raising the clows to a height which would have let off the water. I concur, therefore, with my noble and learned friend in thinking that there ought to be judgment in this case for the Defendant in Error.

LORD COLONSAY:—

My Lords, at the hearing of this case I agreed with my noble and learned friends in entertaining doubts as to the sufficiency of the statement in the writ of mandamus. It appeared to me that its construction was open to doubt, and that it admitted of a construction which would not have comprehended the case brought before the jury. And it appears to me that the judgment of the Court of Queen's Bench proceeded on that construction of the claim, and upon the assumption that nothing was tried, or could have been tried, by the jury, but a claim upon that construction. But I am of opinion that although the statement in the writ of mandamus was not so full and perfect as I should have wished, still, I think, it did admit of the construction which seems to have been put on it by the Chief Justice of the Court of Common Pleas in the Court of Exchequer Chamber. For this was a river which was in an artificial state. It had been converted into a navigable river by mechanical operations; and it is stated in this writ that the whole of these matters, the weir, the lock, and the clows, were under the control and direction of the trustees of the navigation; and I think it would have been a reasonable, or, at all events, not an impossible, construction of that writ, that these three things were represented as parts of the navigation; and that if the injury arose from the improper use, or non-use, of any of these three portions of operation of the navigation of the river, the claim of the Prosecutor might have been sustained. But I entirely concur in the opinion that it is too late to raise that question now. I think it was open at the trial for the Prosecutor to adduce evidence to shew that the water was raised by these artificial operations beyond what it otherwise would have been; and that it would have been competent for the Defendants on that trial to have shewn the reverse. And I think it was the duty of the Judge to tell the jury that unless it appeared that the water had been raised by the operations of the trustees beyond what it would otherwise have been, and had so caused the damage, the verdict ought to be for the Defendants. And I think we are bound to presume that the Judge gave all the directions which were proper in the case, that all the evidence that was receivable under such a proceeding was adduced, so far as the parties chose to adduce it, and that the

Judge in considering the evidence gave the proper directions to the jury—and the verdict of the jury having been for the Prosecutor, I think the judgment of the House ought to be in affirmance of the judgment of the Court of Exchequer Chamber.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 28th June, 1867.

Attorneys for the Plaintiffs in Error: *Williamson, Hill, & Co.*

Attorneys for the Defendant in Error: *Sharpe, Parkers, & Jackson.*

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ADEMPTION—The question whether a portion given in a settlement is an ademption of a gift in a will is one of intention. *Chichester* (*Lord*) v. *Coventry* 71

There is a marked distinction between "ademption" and "satisfaction." In the case of a gift by will the benefit is given by a revocable instrument, and in any future gift the giver may declare his pleasure as to the second gift being taken in substitution for the first. In the case of a gift by settlement, followed by a will, the persons to be benefited have the right to elect which of the gifts they will take—a right which does not necessarily arise in the other case. *Id.*

AFFIDAVIT: *See* REGISTRY ACTS.

AGENT: *See* INSURANCE.

AGREEMENT: *See* FRAUDS, STATUTE OF; RAILWAY; WAIVER; PRACTICE.

By the effect of the 77th, 78th, and 79th sections of the *Railways Clauses Consolidation Act*, 1845, a railway company, on purchasing, under that statute, land for the purposes of the railway, does not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner" and "according to the usual manner of working such mines in the district." The company cannot, under this statutory purchase, claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated. *Great Western Railway Company* v. *Bennett* 27

The *Dudley Canal Company* v. *Grazebrook* (1 B. & Ad. 59) approved. *Id.*

Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly shew, not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding. *Darnley* (*Earl*) v. *The London, Chatham, and Dover Railway Company* 43

Where a party has made a special agreement as to crossings on a line of railway running through his land, if, from particular circumstances, that agreement is not carried into effect, he cannot, on the

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ground of any general rights, claim to have other crossings made, according to the discretion of the Court, for that would be to get the Court to substitute a new agreement, not to enforce the performance of the original. *Darnley (Earl)* v. *The London, Chatham, and Dover Railway Company* 43

Where two parties, under a mistake of fact, enter into an agreement, either of them has a title to come to equity to be relieved from it. That relief will be given on the principles of good conscience alone. *Cooper* v. *Phibbs* 149

A. was in expectation of succeeding to estates then in the possession of his elder unmarried brother. That brother purchased a fishery, which was duly conveyed to him; he afterwards became lunatic, and *A.* was appointed his committee. *A.* had two sons, *B.* and *C.* On *B.'s* marriage, in 1827, a settlement was executed, to which *A.*, *B.*, and *C.* were all parties, and it contained a covenant on the part of *A.*, that if he should succeed to the lunatic's estates of inheritance and hereditaments, he would convey them to trustees for himself for life, then to *B.* and his heirs male in strict settlement, remainder to *C.* and his heirs male in strict settlement. Similar covenants were entered into by *B.* and *C.* *A.* died. The only children of *B.'s* marriage were daughters. *B.* acted, as his father had done, as the committee of the lunatic, and in that character introduced into Parliament a bill to enable the lunatic to make cuts and canals for the improvement of the fishery. While the bill was passing through Parliament the lunatic died, and all his estates, the fishery included, were taken possession of by *B.*, who, having got the Act passed, made the cuts and canals under its authority. The Act recited the settlement of 1827, and that the fishery had been the property of the lunatic, but was by his death vested in *B.* On the death of *B.* (his brother *C.* being already dead) *C.'s* eldest son entered into possession of the estates, but believing (as he had always heard) that the fishery was the property of *B.*, he agreed to take it on a rent from *B.'s* daughters. He soon afterwards read the private Act, and then, believing that, under the deed of 1827 and the provisions of the Act, the fishery really belonged to himself, he filed a Cause Petition in the Court of Chancery in *Ireland*, stating the facts, and praying that the agreement might be ordered to be delivered up, and for such other relief as "the nature of the case would admit of, and to the Court might seem fit." The answer of the daughters claimed the fishery as *B.'s* property under the Act:—

Held, that the fishery was the property of *C.'s* eldest son, under the provisions of the deed of 1827, which were not modified in any way by the Act: *Id.*

Held, also, that the agreement having been made in mutual mistake, the Plaintiff, though there was no fraud, was entitled to have it set aside: *Id.*

Held, also, that under this form of proceeding, the whole facts fully appearing on the face of the petition and answering affidavits, the Court was authorized not only to set aside the agreement, but to declare the Plaintiff's title to the fishery. *Id.*

Per LORD WESTBURY:—In the maxim "*Ignorantia juris haud excusat*," the word "*jus*" has the sense of *general law*. In the sense of *private right* the maxim has no application to it. *Id.*

Special directions were given as to the expenditure made by *B.* on the fishery improvement, and also for the purpose of adding fresh parties to the suit, so as to make a final determination of the cause. *Id.*

ALLOTTEE: *See* COMPANY; CONTRIBUTORY; FRAUD.

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APPEAL: *See* ERROR; FRAUD; REGISTRY.

A bill was filed to rescind a contract on the ground of there having been misrepresentations of facts. Relief was given in the Court below on only some of the alleged grounds. An appeal was brought against the decree:—

Held, that it was open to the Respondent to sustain the decree on any or all of the grounds stated in his bill. *Venezuela Railway Company* v. *Kisch* 99

Where a record has been brought up on error on an award of a *venire de novo*, the whole record being before the House, the sufficiency of the pleadings will be considered. *Carlisle* v. *Whaley* .. 391

ARBITRATOR: *See* WAIVER.

ASSOCIATION: *See* COMPANY; FRAUD; LIMITED LIABILITY.

ATTACHMENT: *See* FOREIGN ATTACHMENT.

AWARD: *See* WAIVER.

BROKER: *See* INSURANCE.

CANAL: *See* PLEADING.

COMMUTATION: *See* TITHES.

COMPANIES' ACT, 1862: *See* COMPANY; CONTRIBUTORY.

COMPANIES CLAUSES ACT: *See* RAILWAY.

COMPANY: *See* FRAUD; INSURANCE.

Where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which, as setting forth the true objects of the association, *A.* had become a shareholder, though he, on discovering the difference, might have repudiated his shares, he could not, after the failure of the company, relieve himself from liability to contribute to its debts on the ground that he had been ignorant of something which, with proper diligence, he might have known. *Oakes* v. *Turquand* 325

It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of neglect. *Id.*

Semble, that at a meeting of shareholders called to agree to a voluntary winding-up of a company, liquidators may be lawfully appointed, though no notice of the resolution to appoint them has been given. *Id.*

A variance between a prospectus and the memorandum of association of a company will not, necessarily and as of course, relieve a member of the company from his liability as a contributory. *Id.*

The *Companies Act* of 1862 did not introduce any rules or principles applicable to the acts or conduct of a shareholder in a company different from those which previously existed, but merely changed the form of proceeding so as to fit it to be applied to the principle of limited liability. *Id.*

By that Act a contributory is a person who has agreed to become a member of the company, and whose name is upon the register. *Id.*

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COMPENSATION: *See* RAILWAY.

CONTRACT: *See* COMPANY; FRAUD; LIMITED LIABILITY; PROSPECTUS; FRAUDS, STATUTE OF.

CONTRIBUTORY: *See* COMPANY; FRAUD; LIMITED LIABILITY.

A. applied, on the faith of statements in a prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. *A.* then applied to have his name removed from the list of contributories:—

Held, affirming the decision of *Malins*, V.C., that it was properly placed there. *Oakes* v. *Turquand* 325

Henderson v. *The Royal British Bank* (7 E. & B. 356) adopted. *Id.*

By the *Companies Act*, 1862, a contributory is a person who has agreed to become a member of a company, and whose name is upon the register. *Id.*

A variance between the prospectus and the memorandum of association of a company will not, necessarily and of course, relieve a member of the company from his liability as a contributory. *Id.*

COSTS—A judgment of the Exchequer Chamber was reversed and a judgment of the Court of Queen's Bench restored. It was restored with costs. *Walsh* v. *Trimmer* 208

Two persons, an original allottee of shares and a purchaser of shares, separately moved the Court to discharge an order declaring them contributories in the matter of a company which was being wound up. Their motions were refused with costs, and the Vice-Chancellor's order contained a direction requiring them (jointly in point of form) to pay costs to the liquidators:—

Held, that this form was erroneous; and that each must be made answerable for the costs incurred in his own petition. *Oakes* v. *Turquand* 325

COURT, HOUR OF SITTING: *See* ERROR.

COVENANT: *See* WILL.

CREDITORS: *See* CONTRIBUTORY.

DEED: *See* INSURANCE.

DELAY—It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of neglect. *Oakes* v. *Turquand* 325

DELIVERY OF DEED: *See* INSURANCE.

DESIGNS—The same nicety is not required in registering patterns or designs as in describing inventions sought to be protected under the Patent Laws. *Holdsworth* v. *M'Crea* 380

The provisions of the 5 & 6 Vict. c. 100, and 21 & 22 Vict. c. 70,

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are complied with by a person who leaves with the Registrar copies of his design, though without any written description specifying precisely what is the extent of his claim. *Holdsworth* v. *M'Crea* .. 380

If what he claims as his design consists, according to the pattern, of of different parts, any one of which might be deemed "a design," his registration of the whole pattern amounts to a claim of the combination, and not of any of the parts thus combined, any one of which, therefore, taken separately, may be imitated. *Id.*

A. registered as a "design," within Class 12, s. 3, of the 5 & 6 Vict. c. 100, a pattern of a woven fabric. He gave no written description of his claim. The design consisted of six pointed stars on an Albert chain, arranged in a particular manner, and shaded, and he claimed, in his particulars in the action, "the particular collocation of the shaded and bordered stars upon the ornamental chain surface, as shewn in the registered pattern, thus forming together the ornamentation of the woven fabric":—

Held, that the design, in respect of the combination, had been duly registered, and that the pattern, as a combination, was protected. *Id.*

DIRECTORS: *See* Fraud.

DISENTAILING DEED: *See* Succession Duties.

DOUBLE PORTIONS: *See* Will.

ERROR: *See* Pleading.

1. Error does not lie to the Exchequer Chamber on a judgment pronounced upon allegations of error in fact. But a wrong decision on an allegation of error in fact may so appear on the record as to constitute error in law, and so may become appealable. *Irwin* v. *Grey, Bart.* 20

2. It is no ground of error, either in fact or in law, that all the special jurors whose names are on the panel to try the cause have not been summoned to attend. Nor is it ground of error that the jury panel was called over before ten o'clock in the morning, the hour appointed for the sitting of the Court, and that ten special jurors only having appeared, the jury was made up with two talesmen. These are irregularities for the Court to set right on motion, if any injustice has been suffered from their occurrence. *Irwin* v. *Grey, Bart.* 20

3. Though a case is brought to this House only upon Error alleged as to the award of a *venire de novo*, the whole record being here, the House will decide on every question of law arising on the record, and therefore on the sufficiency of the pleadings which had been the subjecf of the judgment in the Court below. *Carlisle* v. *Whalley* 391

Though the rule of pleading in *quare impedit* is that, both parties being actors, each must shew a title in himself, and though this rule would include the clerk presented by the patron, it does not apply to him if he has been actually instituted and inducted. The rule is applicable to the Defendant, the patron. *Id.*

Semble, that where a *venire de novo* has been awarded, upon which award, under the 49th section of the 19 & 20 Vict. c. 102, Error may at once be brought, the party against whom that judgment has been pronounced, and who brought Error upon it, is not, by appearing at the trial and there again contesting the matter before a jury, prevented from afterwards bringing such judgment before a Court of Error. *Id.*

The original Court upon application might, under such circumstances, prevent the trial until the proceeding in Error had been determined. *Id.*

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EVIDENCE: *See* Error; Pleading.

By the 6 Anne, c. 2, s. 4, a registered deed is to be taken as good and effectual according to the time of registering the memorial thereof. By the 5th section all deeds prior in date, but unregistered, are to be absolutely void as against the registered deed:—

Held, that under a plea which was in form in bar of the action, and which alleged the time of registration under a videlicet, proof of the registration of a deed which really defeated the action might be given, though the deed was not in fact registered till after the commencement of the action, but before plea pleaded. *Carlisle* v. *Whaley* 391

The Bishop of Meath v. *The Marquis of Winchester* (4 Cl. & F. 445, 556) explained and applied. *Id.*

FISHERY: *See* Agreement.

FOREIGN ATTACHMENT—Where an inferior Court proceeds in a cause properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the Court is incompetent to try. *Mayor, &c. of London* v. *Cox* 239

But where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once. *Id.*

The Lord Mayor's Court in *London* is an inferior Court. *Id.*

When, therefore, process had issued out of that Court against *C.* as a garnishee, and he declared in prohibition—a plea which set up the custom of foreign attachment, but did not allege, and the fact did not warrant any such allegation, that the original debt, or the debt alleged to be due from the garnishee to the Defendant, arose within the *City*, or that any one of the parties to the suit was a citizen, or was resident within the *City*, the plea was held insufficient to shew the existence of jurisdiction.

And consequently the garnishee was at liberty in such a case to proceed in prohibition without first putting in a plea in the Lord Mayor's Court setting forth the facts which shewed the want of jurisdiction. *Id.*

FRAUD: *See* Misrepresentation.

Where a person believes that he has been misled, by representations which are false or deceptive, into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay. *Venezuela Railway Company* v. *Kisch* .. 99

The same rules as to false or deceptive representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. No misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company. *Id.*

The public are, in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess. *Id.*

The phrase "available capital of the company" is not a true, but is a deceptive, description of capital which may be raised under the borrowing powers conferred upon directors. *Id.*

Where a prospectus described a contract for the construction of a line of railway as entered into at "a price considerably within the available capital of the company," and the facts were, that from the nominal capital of £500,000 were to be deducted £50,000 as the price

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of purchasing the concession to make the railway, and the contract price for making it was £420,000, the representation was held to be untrue and deceptive. *Venezuela Railway Company* v. *Kent* .. 99

Where there has been fraudulent misrepresentation, or wilful concealment, by which a person is induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry. *Id.*

A prospectus of a railway company stated that "the engineer's report, maps, plans, &c., may be inspected, and further information obtained at the offices of the company." An applicant for shares signed the printed form of application, in which, as usual, it was stated that he agreed to be bound by the conditions and regulations contained in the memorandum and articles of association. An examination of all of them would have afforded him the information, the want of which he alleged as a ground for rescinding his contract. He did not examine them :—

Held, that his neglect to do so was no answer to his demand to be relieved from the contract. *Id.*

Where a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, but he may rescind it. But he must do so within a reasonable time. *Oakes* v. *Turquand* 325

A contract induced by fraud is not void, but voidable; and therefore, though the persons who by their fraud induced it may not enforce it, other persons may, in consequence of it, acquire interests and rights, which they may enforce against the party who has been so induced to enter into it. *Id.*

FRAUDS, STATUTE OF—Though it is not necessary that the signature of a party should (within the *Statute of Frauds*) be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate every material and operative part of the instrument. Where, therefore, the name of the party against whom specific performance was sought to be enforced appeared in different parts of the paper, but only in such a way that, in each case, it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of undertaking :—

Held, that the paper did not constitute a contract signed within the provisions of the *Statute of Frauds*. *Caton* v. *Caton*. 127

C. proposing to marry *H.*, wrote out a paper beginning thus: "In the event of a marriage between the under-mentioned parties, the following conditions as a basis for a marriage settlement are mutually agreed upon." Then followed several sentences in this form: "*C.* to do so and so, *H.* to have so and so." No name of either party was signed to the paper, which was delivered by *C.* to *H.'s* solicitor for the purpose of drawing the settlement. No settlement was ever executed; it was dispensed with by *H.* at *C.'s* request, upon *C.'s* verbal promise to give *H.* certain advantages by his will. *C.* died, and the will was not found to fulfil the promise :—

Held, that *H.* was not entitled to specific performance of the arrangements mentioned in the written paper, as it did not constitute a contract within the meaning of the *Statute of Frauds*. *Id.*

GARNISHEE: *See* FOREIGN ATTACHMENT.

GIFT: *See* WILL.

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HOP GROUNDS: *See* TITHES.

HOUR OF SITTING OF COURT: *See* ERROR.

INFERIOR COURT: *See* FOREIGN ATTACHMENT.

INQUIRY: *See* FRAUD.

INSURANCE—A policy of insurance purported to be "signed, sealed, and delivered" by two of the directors of an insurance company in the presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company. This statement was taken, as against the company, to be conclusive that it was not only duly signed and sealed, but also duly delivered. *Xenos* v. *Wickham* 296

A policy "signed, sealed, and delivered," is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it. *Id.*

It is not necessary that the assured should formally accept or take away a policy in order to make the delivery complete. *Id.*

After the broker had prepared a slip, and the proposed insurer had accepted it, and had prepared a policy in accordance with it, a desire was expressed by him, and assented to by the underwriter, that the policy should be cancelled, on which a cancellation was in form effected:—

Held, that this was not effectual as to the assured, who had not, in fact, given the broker any authority to cancel the policy. *Id.*

Per LORD CRANWORTH:—It is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into. *Id.*

A., a broker, was instructed to effect for *B.*, a shipowner, an insurance on a ship. *A.* gave a slip to *C.* (the authorized representative of an insurance company), which was accepted, and a policy prepared accordingly. When the policy (with the account debiting *A.* with the premium) was sent to *A.*'s office, "duly signed, sealed, and delivered," his clerk said there had been a mistake, that the policy ought not to have gone forward, and that there was no premium due. This was repeated by another clerk of *A.*, who came to *C.*'s office for that purpose, and requested the cancellation of the policy. *C.* acted on these representations (which, however, had been made by *A.*'s clerks without any authority from *B.*, the shipowner), and cancelled the policy, but charged *A.* with the stamp duty paid, and gave the policy to *A.* to enable him, if possible, to get a return of the stamp duty on it. The ship was lost, and *B.* made his claim for the loss:—

Held, that the circumstances were sufficient to shew an execution and delivery of the policy, and that the unauthorized act of *A.* afforded no answer to the claim. *Id.*

INTENTION: *See* WILL.

JURY: *See* ERROR, 2.

LANDS CLAUSES ACT: *See* RAILWAY.

LIEN: *See* MORTGAGE.

LIMITED LIABILITY: *See* COMPANY; FRAUD.

The Limited Liability Acts previous to 1862 do not destroy, but only restrict, the liability of a shareholder in a company formed under their provisions, and change the form of enforcing it. *Oakes* v. *Turquand* 325

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The direct remedy of a creditor of such an incorporated company is solely against the company, and not against its individual members as upon a contract with them. But though, as between the company and the member, the member might have a good legal or equitable defence to a call upon himself, he may be liable to contribute to the assets of the company required for the payment of the company's creditors. *Oakes* v. *Turquand* 325

A member of a limited liability company which is wound up, resembles, with respect to creditors, a member of a company under the Acts of 1844, or a partner in a partnership which has become bankrupt. The only difference is as to the extent of the liability. *Id.*

The *Companies Act* of 1862 did not introduce any rules or principles applicable to the acts or conduct of a shareholder in a company different from those which previously existed, but merely changed the form of proceeding so as to fit it to be applied to the principle of limited liability. *Id.*

By that Act a contributory is a person who has agreed to become a member of the company, and whose name is upon the register. *Id.*

LIQUIDATORS—*Semble*, that at a meeting of shareholders called to agree to a voluntary winding-up of a company, liquidators may be lawfully appointed, though no notice of a resolution to appoint them has been given. *Oakes* v. *Turquand* 325

LONDON: *See* Foreign Attachment.

LORD MAYOR'S COURT: *See* Foreign Attachment.

MANDAMUS: *See* Pleading.

MARRIAGE SETTLEMENT: *See* Frauds, Statute of; Will.

MEMORANDUM OF ASSOCIATION: *See* Company; Fraud; Limited Liability; Prospectus; Frauds, Statute of.

MINES—By the effect of the 77th, 78th, and 79th sections of the 8 & 9 Vict. c. 20 (*Railways Clauses Consolidation Act*, 1845), a railway company on purchasing, under that statute, land for the purposes of the railway, does not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner" and "according to the usual manner of working such mines in the district." The company cannot, under this statutory purchase, claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated.

The *Dudley Canal Company* v. *Grazebrook* (1 B. & Ad. 59) approved. *Great Western Railway Company* v. *Bennett* 27

MISTAKE: *See* Agreement.

MORTGAGE—A mortgagee who takes possession of the mortgaged estate is, on a bill for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default; but where persons, who though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established. *Parkinson* v. *Hanbury* 1

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A person who, under a mortgagee, becomes possessed of a property, supposing himself to be its purchaser, if it afterwards appears that he is not validly clothed with that character, but only holds a lien on the property in virtue of the money advanced by him on the supposed purchase, cannot, therefore, be so treated as to make him liable to render accounts as an ordinary mortgagee in possession. It is essential to the creation of such a liability that he should have known he was in possession as mortgagee.

Neesom v. *Clarkson* (2 Hare, 163) observed upon. *Parkinson* v. *Hanbury* 1

PATENT: *See* DESIGNS.

PLACE OF ABODE: *See* REGISTRY ACTS.

PLEADING: *See* MORTGAGE.

Where a Plaintiff seeks to open a settled account, there must be in the bill a distinct statement of some specific error in the account. *Parkinson* v. *Hanbury* 1

Where a Cause Petition (in *Ireland*) in seeking the cancellation of an agreement for the hiring of property, sets forth facts which go to establish a title to the property itself, and the answering affidavits do not deny these facts, but set up a title in the Defendants to the property, the Court may, under the general prayer for relief, make a declaration as to the Plaintiff's title to the property. *Cooper* v. *Phibbs* 149

A garnishee in a foreign attachment may proceed to prohibition without first putting in a plea in the Losd Mayor's Court setting out facts to shew its want of jurisdiction. *Mayor, &c. of London* v. *Cox* 239

A plea in *quare impedit* which denies that which it was necessary for the Plaintiff to aver and prove in order to maintain his title, and which plea, if proved by the Defendant, would destroy the Plaintiff's title, is sufficient on general demurrer. *Carlisle* v. *Whaley* 391

The word "action" in the interpretation clause (sect. 4) of the *Common Law Procedure Act* (*Ireland*), 1853, does not restrict the operation of that Act, to personal actions, and therefore does not affect the 81st section, which relates to special demurrers. *Id.*

If there is in a writ of mandamus a defective statement of a valid claim, but that statement renders it necessary to establish facts which, if established, would support the claim in the writ, the defectiveness, though it might be fatal on demurrer, is cured by the verdict. *Delamere* v. *The Queen* 419

A landowner complained in his writ of mandamus that the Defendants were the trustees of a navigation—that there were a lock, weir, and clows (sluices) near his land, that they were under the management of the trustees, that owing to heavy rains the water had greatly risen, that the clows were not raised to such a height to let off the water as they ought to have been, and, but for possible damage to works of the trustees in another place, would have been, whereby he suffered damage; but he did not allege that the effect of the lock, weir, and clows, was to raise the water higher than it would have risen had they not existed. The issue on the return and pleadings was, whether the damage was occasioned on account of the navigation:—

Held, that the allegations in the writ, though they might have been insufficient on demurrer, were, after verdict, sufficient to warrant judgment for the Prosecutor. *Id.*

POLICY: *See* INSURANCE.

PORTIONS: *See* WILL.

POSSESSION OF DEED: *See* INSURANCE.

PRACTICE: *See* AGREEMENT; COSTS; ERROR; FRAUD; PLEADING.

A bill was filed to rescind a contract on the ground of there having been misrepresentations of facts. Relief was given in the Court below on only some of the alleged grounds. An appeal was brought against the decree:

Held, that it was open to the Respondent to sustain the decree on any or all of the grounds stated in his bill. *Venezuela Railway Company* v. *Kisch* 99

In a suit to set aside an agreement as made in mistake, where the prayer of the bill was granted, special directions were given as to the mode of taking the accounts with a view to ascertain the expenditure incurred in respect of the property which had been the subject of the agreement. *Cooper* v. *Phibbs* 149

PRESUMPTION: *See* WILL.

PROHIBITION: *See* FOREIGN ATTACHMENT.

PROSPECTUS: *See* FRAUD.

A variance between a prospectus and the memorandum of association of a company will not necessarily, and as of course, relieve a member of the company from his liability as a contributory. *Oakes* v. *Turquand* 325

PURCHASE: *See* MORTGAGE.

QUARE IMPEDIT: *See* ERROR; PLEADING.

RAILWAYS CLAUSES ACT: *See* RAILWAY.

RAILWAY—Where a person has made a special agreement as to crossings on a line of railway, and, from particular circumstances, he allows that agreement to fall through, he cannot afterwards set up general rights under the Railway Acts to have other crossings made. *Darnley (Earl)* v. *London, Chatham, and Dover Railway Company* 43

Unless an injury to an individual, occasioned by the act of a public company, would have been the subject of a claim for damages before the company obtained statutory powers to do that which occasioned the injury, it could not (except expressly so provided), be a subject for compensation when occasioned by something done in the exercise of those powers. *Ricket* v. *The Metropolitan Railway Company* .. 175

No case comes within the purview of the 68th section of the *Lands Clauses Act*, or the 6th section of the *Railways Clauses Act*, unless in respect of damage to the land itself, which damage would have been the subject of an action at law before those statutes. *Id.*

A mere temporary obstruction (the cause of loss of trade to an individual), occasioned by the performance of some lawful and necessary work, would not have been the subject of such an action—and is not, under the 16th section of the *Railways Clauses Act*, the subject of compensation. *Id.*

Semble, per LORD CHELMSFORD, L.C.:—It does not follow, because a party might have had a right of action before the statute, that he would, in respect of the same cause, have a title to claim compensation after it. *Id.*

R. was the occupier of a public house, situated by the side of a public foot-way. A company obtained powers under certain Acts of Parliament (with which the provisions of the *Lands Clauses Act*, and the *Railways Clauses Act*, were declared to be incorporated), to make

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a railway. The company in carrying these powers into execution, obstructed streets leading to this footway so as to make the access to the public house inconvenient. The obstructions were not permanent, and, after some time, the streets were restored to their original condition. It was found by the jury that there was no structural damage to the premises, but that *R.* had sustained damage in respect of the interruption to his business.

Held (*diss.* Lord *Westbury*), that *R.* was not entitled under the 68th section of the *Lands Clauses Act*, nor the 6th or the 16th sections of the *Railways Clauses Act*, to receive compensation for injury to his trade consequent upon these obstructions. *Ricket* v. *The Metropolitan Railway Company* 175

Per Lord Westbury :—The words of the *Railways Clauses Act*, "injuriously affected," do not mean wrongfully in the sense of unlawfully, but "damnously," that is injuriously, affected in the ordinary sense of that word. *Id.*

And—There is nothing in these two statutes to warrant the position that there shall be no compensation, where at common law there would have been no right of action. *Id.*

And also—The trade carried on in particular premises is a thing appertaining to the premises, and, as such, is included in the "interest" of the occupier; and that interest is part of the value of the property, and if injuriously affected, is to be compensated. *Id.*

And also—The meaning of "parties interested," in the 16th section of the *Railways Clauses Act*, is, parties sustaining a special and individual loss by reason of the works which the section empowers the company to construct, and *R.* was entitled to compensation under this section. *Id.*

RAILWAY COMPANY: *See* Fraud.

REGISTRATION: *See* Designs.

The certificate of the registrar under the *Companies Act*, 1862, is conclusive that all previous requisites have been complied with. *Oakes* v. *Turquand* 325

REGISTRY ACTS—Where there is, in an affidavit made under the 13 & 14 Vict. c. 29, s. 6, an insufficient description of the place of abode of a judgment debtor, the supplemental affidavit authorized, under the 21 & 22 Vict. c. 105, to be filed by the creditor, will not cure the defect, the object of the latter statute being to supply a verification to facts already sufficiently stated in the first affidavit, but not properly verified. *Thorp* v. *Browne* 220

T. had obtained a judgment against *B.*, and filed an affidavit under the former statute, in which he stated (heading the affidavit with the name of the cause) that he had obtained "a judgment in the Court of Exchequer in *Ireland* against the Defendant in this cause, by the name and description of *G. H. B.*, formerly of *Ballina Park*, in the county of *Wexford*, and now of the city of *Dublin*, Esquire, for" &c., besides costs :—

Held, that the affidavit was sufficient within the provisions of the 13 & 14 Vict. c. 29, and constituted a good statutory mortgage on the Defendant's estate. *Id.*

RENT-CHARGE: *See* Tithes.

REPRESENTATION: *See* Fraud.

SATISFACTION—The question whether a gift in a will is a satisfaction of a portion given in a settlement is one of intention. *Chichester* (*Lord*) v. *Coventry* 71

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B., on the marriage of his daughter, covenanted by settlement to pay to the trustees, three months after demand, £10,000 for the uses of the marriage, with interest till payment. The principal sum was not demanded in his life, and the interest was paid. He afterwards made a will, giving his property to trustees, "in the first place to pay his debts and legacies, &c.," and then to divide the residue into equal moieties, and to transfer the same to his daughters. The trusts created by the will were very different from those created by the settlement:—

Held, that the gift by the will was not a satisfaction of the covenant in the settlement, and that the £10,000 must be deducted from the testator's assets before the residue was divided into moieties. *Chichester (Lord)* v. *Coventry* 71

SHAREHOLDER: *See* COMPANY; FRAUD; LIQUIDATORS.

A prospectus of a railway company stated that "the engineer's report, maps, plans, &c., may be inspected, and further information obtained at the offices of the company." An applicant for shares signed the printed form of application, in which, as usual, it was stated that he agreed to be bound by the conditions and regulations contained in the memorandum and articles of association. An examination of them would have afforded him the information, the want of which he alleged as a ground for rescinding his contract. He did not examine them:—

Held, that his neglect to do so was no answer to his demand to be relieved from the contract. *Venezuela Company* v. *Kisch* 99

SIGNATURE: *See* FRAUDS, STATUTE OF; INSURANCE.

SPECIFIC PERFORMANCE: *See* FRAUDS, STATUTE OF.

STATUTES:—

6 Anne, c. 2. *Carlisle* v. *Whaley* 391

7 Geo. 1, c. x. *Delamere* v. *The Queen* 419

33 Geo. 2, c. xlix. *Id.*

10 Geo. 4, c. lxx. *Id.*

6 & 7 Will. 4, c. 71. *Walsh* v. *Trimmer* 208

5 & 6 Vict. c. 100. *Holdsworth* v. *M'Crea* 380

8 & 9 Vict. c. 18. *Ricket* v. *Metropolitan Railway Company* .. 175

——————— *Great Western Railway Company* v. *Bennett* .. 27

————, c. 20. *Ricket* v. *Metropolitan Railway Company* .. 175

13 & 14 Vict. c. 29. *Thorp* v. *Browne* 220

———————— c. 104. *Holdsworth* v. *M'Crea* 380

16 & 17 Vict. c. 51. *Lilford (Lord)* v. *The Attorney-General* .. 63

19 & 20 Vict. c. 102. *Carlisle* v. *Whaley* 391

21 & 22 Vict. c. 70. *Holdsworth* v. *M'Crea* 380

25 & 26 Vict. c. 89. *Oakes* v. *Turquand* 325

STATUTORY MORTGAGE: *See* REGISTRY.

STATUTORY PURCHASE: *See* MINES.

SUCCESSION DUTIES—A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him, by the exercise of the power which that interest gives him, to render it perpetual.

Therefore, where a tenant in tail executed a disentailing deed, and died before any instalment of duty under the *Succession Duties Act* (16 & 17 Vict. c. 51) became due, and his son and devisee (who but for the deed would have been the next tenant in tail) succeeded to

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the property, he was held liable to satisfy the duty which his father ought to have paid. The interest of the father became, under such circumstances, according to the proviso in the 21st section of the statute, a "continuing interest," of which the father was "competent to dispose by will," and the duty was a "continuing charge on such interest." *Lilford (Lord)* v. *The Attorney-General* 63

SUPPORT, ADJACENT AND SUBJACENT: *See* MINES.

SURFACE: *See* MINES.

TAIL, TENANT IN: *See* SUCCESSION DUTIES.

TIME: *See* ERROR; WAIVER.

TITHES—The commutation of tithes does not mean merely the commutation of existing tithes into a rent-charge settled at the moment, but the commutation of the right to take the tithes into the right to take a rent-charge in lieu of them. Consequently, where lands, at the time of a commutation and apportionment, were not liable to, and did not pay, any tithes, but such lands were afterwards inclosed, and were cultivated as hop grounds, they became liable, under the 6 & 7 Wm. 4, c. 71, s. 42, to pay the extraordinary charge fixed by the Commissioners to be paid by lands in the particular district cultivated as hop grounds. *Walsh* v. *Trimmer* 208

A commutation of tithes took place in the parish of *B.*, and a valuation and apportionment were duly declared, and the extraordinary charge for hop cultivation fixed. In that parish was a large piece of waste land which at that time did not pay tithes. Some years afterwards this waste land was inclosed, and it was cultivated as a hop garden:—

Held (reversing the judgment of the Exchequer Chamber, and restoring the judgment of the Queen's Bench), that it thereby became liable to the extraordinary charge fixed by the Commissioners upon lands in that parish cultivated as hop grounds. *Id.*

TRADE PROFITS: *See* RAILWAY.

VOID OR VOIDABLE: *See* FRAUD.

WAIVER—A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. *Darnley (Earl)* v. *London, Chatham, and Dover Railway Company* 43

Where there has been an agreement between two parties, giving power to a third to make, within a certain time, an award on a matter in difference between them, if the award is not made within the specified time, but one of the parties, not knowing that fact, takes it up and pays the charge for it, his doing so will not amount to a waiver of the condition as to time contained in the agreement. *Id.*

Quære, whether taking up an award known to have been made after the limited time would amount to an admission that the arbitrator's authority had not expired. *Id.*

WATER: *See* PLEADING.

WILL—The question whether a gift in a will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a will, is one of intention. *Chichester (Lord)* v. *Coventry* .. 71

The rule that there is a presumption against double portions is founded on the assumption, that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the

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first. This rule is much easier of application where the will precedes the settlement than where the settlement precedes the will. In the latter case, the intention to satisfy a covenant must be distinctly expressed, or clearly indicated. Great differences in the sums given, and in the limitations of the trusts on which they are given, will be taken as indications that the gift in the will was not meant in satisfaction of the covenant. Where, too, the gift is not to the child, but to trustees, to pay debts and legacies, and then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared. *Chichester (Lord)* v. *Coventry* 71

B., on the marriage of his daughter, covenanted by settlement to pay to the trustees, three months after demand, £10,000 for the uses of the marriage, with interest till payment. The principal sum was not demanded during his life, and the interest was paid. He afterwards made a will, giving his property to trustees, "in the first place to pay his debts and legacies, &c.," and then to divide the residue into equal moieties, and to transfer the same to his daughters. The trusts created by the will were very different from those created by the settlement:—

Held, that the gift by the will was not a satisfaction of the covenant in the settlement, and that the £10,000 must be deducted from the testator's assets before the residue was divided into moieties. *Id.*

WORDS:—

"Action:" *See* Pleading.

"Available capital:" *See* FRAUD.

"Continuing charge:" *See* SUCCESSION DUTIES.

"Continuing interest:" *See* SUCCESSION DUTIES.

"Injuriously affected:" *See* RAILWAY.

"Interest:" *See* RAILWAY.

"Extraordinary charge:" *See* TITHES.

"Parties interested:" *See* RAILWAY.

"*Jus*:" *See* AGREEMENT.

"Signed, sealed, and delivered:" *See* INSURANCE.

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